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IN THE

Supreme Court of the United States

October Term, 1956

No. 1103

WILLIAM S. GIRARD,
Petitioner-Appellee,

v.

CHARLES E. WILSON, *et al.*,
Respondents-Appellants.

BRIEF FOR APPELLEE AND APPENDIX

Facts and Resume of Litigation

Petitioner-Appellee is a citizen of the United States serving with the United States Armed Forces in Japan. For several months past he has been held in custody by the United States Military Authorities at Camp Whittington in the vicinity of Tokyo, for the purpose of being delivered to the Japanese government to stand trial before a Japanese Court for an offense allegedly in violation of Japanese law.

On February 7, 1957, Petitioner's Commanding Officer certified as follows:

> ". . . Girard, William S., RA 16 452 809, Specialist Third Class, Company F., 8th Cavalry Regiment, APO 201, was in the performance of his official duty at 1350 hours, 30 January 1957, Camp Weir Range Area, when he was involved in the following incident: On 30 January 1957, 2nd Battalion, 8th Cavalry Regiment, was engaged in routine training at Camp Weir Range Area. Company F was conducting blank firing exercises. Specialist Third

> Class William S. Girard was instructed by his platoon leader to move near a position near an unguarded machine gun to guard the machine gun and items of field equipment that were in the immediate area. Girard, following instructions, moved to the designated position near the machine gun. While performing his duties as guard, he fired an expended cartridge case, as a warning, which struck and killed Sakai, Naka, Kami-Shinden, Somamura, Gumma Prefecture, who had entered the range area for the purpose of gathering expended cartridge cases."

On June 4, 1957, a joint statement was issued by the Secretary of State and the Secretary of Defense wherein they say, among other things, that pursuant to a "treaty and agreement" and pursuant to "treaty arrangements", a "United States representative" agreed to deliver Girard to the Japanese government for trial and "in view of this completed action, attempting to prolong the dispute over the jurisdictional issue would create a situation which could basically affect United States relations not only with Japan, but also with other nations"—therefore, as far as these two high officials of the Executive Department of this government were concerned, they approved what was done as a *fait accompli*. Like Pontius Pilate they washed their hands.

On June 6, 1957, an Order to show cause why a writ of habeas corpus should not issue, containing a stay pending hearing, was signed by Honorable Joseph C. McGarraghy, Judge of the United States District Court for the District of Columbia. On June 11, 1957, at the hearing before the District Court, the Government admitted and stipulated upon the record that the offense, for which the Japanese government was seeking to try petitioner, arose out of an act or omission in the performance of his official duty and that petitioner was being held for surrender to the Japanese government for trial as directed and announced in the joint statement of Secretaries Dulles and Wilson.

Respondents-Appellants' Return and Answer to the order to show cause alleges, "The decision by the United States not to exercise jurisdiction in this case is a discretionary decision of the Executive Branch in the conduct of foreign affairs and the military defense of the United States, and as such *is a political decision not subject to judicial review.* There has been no abuse of discretion" (Par. 7).

The Return and Answer further alleges that there were certain agreements and arrangements between the United States and Japan pursuant to which discretionary power was vested in the Executive Branch of the United States government to deliver Petitioner to Japan for trial and that the decision so made was not subject to judicial review (Pars. 3, 4 and 7).

Petitioner's reply to the Return and Answer denies the existence of the discretionary power, denies the existence of any valid treaty between the United States and Japan, denies that any offense against the Japanese law had been committed, denies that the named Respondents or anyone else may deprive Petitioner of his constitutional rights, and affirmatively asserts that the detention of the Petitioner for delivery to a foreign government is illegal and unconstitutional.

The District Court made a ruling during the hearing, predicated upon the admissions and stipulations of counsel for the Respondents in open court, that no issue of fact was raised; that only issues of law were involved; and that it was not necessary to produce Petitioner at the hearing as would otherwise have been required by the provisions of Title 28 U. S. Code 2243.

On June 17th, a document entitled "Motion to Expedite Determination", to which was attached an affidavit of the Secretary of State, was filed with the District Court. This affidavit, unlike the earlier one submitted in support of a motion to quash subpoena and in some respects contra-

dictory thereto, recites that the "conclusion" which he and the Secretary of Defense had reached and announced in their joint statement, "was discussed with and confirmed by the President"—thereby placing full responsibility for any possible wrongdoing on the President himself.

On June 18th the Opinion of the District Judge was filed and an Order was entered thereon enjoining the Respondents from delivering Petitioner to the Japanese government. Appeal from said Order was taken by the Respondents-Appellants to the Court of Appeals for the District of Columbia Circuit. Cross-appeal from so much of the Order as denies the Writ of Habeas Corpus and discharges the order to show cause was taken by the Petitioner-Appellee. Prior to judgment and pursuant to the provisions of Section 1254(1) Title 28 of the U. S. Code, petitions for a Writ of Certiorari were filed by both sides with this Honorable Court. On June 21, 1957, both petitions were granted. The cases were consolidated and assigned for argument on Monday, July 8, 1957. A separate brief on the cross-appeal by Petitioner under No. 1108, October, 1956 Term, has been filed with this Court on July 1, 1957.

Preliminary Argument

The issues on this appeal probe deeply into fundamental principles and basic concepts of constitutional law concerning the proper exercise of power by the Executive, the limitations upon such power, and the authority of the Executive to alienate or infringe upon the constitutional rights of the citizen. Also involved is the legality of the attempted usurpation of power by the Executive and his encroachment upon the constitutional functions of the Legislative and Judicial branches of this government.

The contention that the Executive may make a discretionary political determination to confer jurisdiction in a

criminal case, in disregard of the deep-rooted maxim that this is a government of laws and not of men, is so unprecedented as to be inconceivable. Were it to be embraced as the new and modern rule, then our entire concept of constitutional government and the rights of the individual must be completely overhauled and revamped. So dangerous would be a precedent that the Executive has unreined discretionary power to confer criminal jurisdiction and so vast are its implications, that it could well be a proverbial "dragon's-tooth" which could spring forth irrepressibly to further encroach upon rights heretofore held inviolate. On this appeal, the person of soldier Girard is directly involved, but the precedent here established may well chart the course on which our ship of state will sail—for better or for worse.

The Self Investiture of Executive Power to Confer Criminal Jurisdiction, the Steps Taken to Acquire it, and Comments as to its Illegality

Simultaneous with the signing of the Treaty of Peace on September 8, 1951, a Security Treaty was entered into between the United States and Japan. It consists of five paragraphs. It recites that *at the request of Japan and for its defense,* the United States agrees to maintain certain of its Armed Forces in Japan. Article 3 reads: "The condition which shall govern the *disposition of Armed Forces* of the United States of America in and about Japan shall be determined by administrative agreements between the two governments". (Italics supplied.)

The word "disposition" as generally understood and as defined in all dictionaries means arrangement, allocation, placement, employment, user, etc. Nowhere is it defined to include "status" or other meanings which the appellants attribute to it.

Relying on the wording of Article 3 of the Security Pact, "an Administrative Agreement" was entered into on

February 28, 1952 wherein it was provided, among other things, that the United States shall have exclusive criminal jurisdiction over all offenses which may be committed in Japan by members of the Armed Forces, the civilian component thereof and over certain dependents (Article XVII). It was further provided that at a later date the United States would conclude with Japan, at the option of Japan, another agreement on criminal jurisdiction similar to the NATO Status of Forces Agreement.

On or about September 29, 1953, Mr. Allison, acting on behalf of the United States, entered into a so-called "Protocol to amend Article XVII of the Administrative Agreement of February 28, 1952" and thereby sought to change entirely (not amend) the earlier provisions respecting the exclusive criminal jurisdiction which the United States was exercising over its Armed Forces in Japan.

A Protocol is defined in the dictionary as an original draft or a word used in diplomatic parlance as a "preliminary memorandum, as of resolutions arrived at in negotiations, often signed by the negotiators, as a basis for a final convention or treaty."

There is nothing in the Security Treaty of September 8, 1951 or the Administrative Agreement of February 28, 1952, which permits or authorizes Mr. Allison or any other person acting on behalf of the United States to whittle away or surrender jurisdiction which the United States was then exercising over its military forces in Japan.

There is a statement in Article XVII of the Administrative Agreement to the effect that the United States will conclude with Japan an agreement on criminal jurisdiction similar to the NATO Status of Forces Treaty, but the fact remains that no such agreement was ever entered into. The Protocol was merely the preliminary negotiations, and the advice and consent of the United States Senate was neither sought nor obtained in order to finalize it into a Treaty. The fact is that the Senate of the United States

made a specific reservation, when consenting to ratification of the NATO Status of Forces Treaty to the effect that it was not to be a precedent for future agreements of similar nature. The Executive disregarded this mandate entirely and continued to make similar agreements with other countries including Japan, pursuant to which agreements the constitutional rights of American servicemen were and are being torn away.

When consenting to the NATO Treaties, which included the agreement concerning criminal jurisdiction, the Senate reservation directed that there should be no surrender of jurisdiction in any case where the constitutional rights of the accused may be diminished, denied or destroyed (T.I.A.S. 2846). These were direct mandates of the Senate of the United States, which body is charged under the Constitution, with the duty of advising and consenting to treaty contracts. Only in the case of the NATO nations was the Senate willing to partially relinquish criminal jurisdiction over our Armed Forces. It is doubtful, however, if they had the constitutional authority to relinquish any jurisdiction, with or without the reservations (U. S. Constitution Article 1, Section 8, Cl. 14; *Ex Parte Quirin*, 317 U. S. 1).

In any event, the Senate's action in *conferring* jurisdiction over "off duty offenses" to visited NATO countries indicates its understanding of international law that our Army was not subject to the jurisdiction of the foreign nation. Had jurisdiction existed in the foreign country, as the Appellants here contend, there would have been no need to *confer* jurisdiction. The argument that under international law a visiting force is subject to the jurisdiction of the nation in which it is stationed, is erroneous. That is not the law and it is on this false premise, as well as others, that the Appellants have built their case and seek to justify their action.

The Protocol of September 29, 1953, which the government contends constituted a "law" binding on American

citizens, is in disregard of the Senate's reservations. Aside from its unconstitutionality (a subject hereinafter discussed), said Protocol has no legal validity (1) because it is not an agreement but merely a statement of preliminary negotiations; (2) because the negotiator, who signed on behalf of the United States, exceeded authority which was purportedly contained in Article XVII of the Administrative Agreement of February 28, 1952 and (3) because the Protocol was not authorized, approved or consented to by the United States Senate and is directly contrary to the Senates express mandate.

For the purpose of the argument which follows and for no other, the Petitioner-Appellee will assume that the Protocol of September 29, 1953 may be viewed as a valid agreement. It granted to Japan certain criminal jurisdiction with the express reservation that "the military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States armed forces and the civilian component in relation to (i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or the civilian component or of a dependent; (ii) *offenses arising out of any act or omission done in the performance of official duty.*" It further provided that if the state having the primary right decides not to exercise jurisdiction, notice thereof shall be given to the authorities of the other State as soon as practical in which event the "authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance."

As part of the Protocol there are certain "agreed official minutes regarding Protocol to amend Article XVII of the Administrative Agreement". It appears that the negotia-

tors sought to incorporate them by reference. These "agreed official minutes" make provision as follows: "Where a member of the United States armed forces or the civilian component is charged with an offense, a certificate issued by or on behalf of his commanding officer stating that the alleged offense, if committed by him, arose out of an act or omission done in the performance of official duty, shall, in any judicial proceedings be sufficient evidence of the fact unless the contrary is proved."

Under the Government's theory of this case these so-called "agreed official minutes" also became "law"—an illusive law, however, which the Executive may set aside at will. When set aside, the will or dictates of the Executive became the "law".

When all the above enumerated documents were signed, sealed and delivered, there was still lacking provision for the exercise of Executive will and there was no provision requiring or permitting the Executive to deliver an American national to another nation for trial. Nor was any machinery or procedure established for transfer of the citizen, such as is normally contained in extradition treaties. Accordingly, the negotiators moved onto the fifth step of this bootstrap-lifting operation to invent more power.

A new and novel source of law was evolved. It is called "Agreed Views" published in A.F.F.E. pamphlet 27-1. It is the alleged function of the "Agreed Views" to interpret the several loosely drawn documents to which reference is hereinabove made—an obvious Executive usurpation of the function of our judiciary. "Agreed Views" was then followed by a sixth step—the issuance of a unilateral circular entitled "U. S. Army Forces, Far East and Eighth U. S. Army (*Rear*), Circular 22-1, dated January 24, 1956". This "circular" and "Agreed Views" are now looked to as some sort of legislation or new kind of international agreement. Its purpose is to permit fulfillment of earlier

alleged agreements designed to create authority in the Executive to act as the absolute monarch in matters of criminal jurisdiction affecting American servicemen overseas. Now, before this Honorable Court, counsel for the government go one step further. They say that the President's conduct in these matters is not subject to judicial review. The old "divine right of Kings" is heard once more with its hollow echo that the "King can do no wrong."

All the acts performed and the documents executed, the Government asserts, (1) were authorized by the words "disposition of Armed Forces" contained in Article III of the Security Treaty made on September 8, 1951; (2) have the binding force of law; (3) empowered and authorized the President of the United States and his subordinates to hand Girard over to the Japanese government for trial; (4) prevents Girard from complaining because he, like everybody else, is presumed to know the law and the effect of these documents (although neither he nor anyone else ever heard of all of them); (5) places Executive decisions respecting criminal jurisdiction outside the realm of judicial review; and lastly, (6) permits and authorizes the taking of Constitutional rights from Girard, the American soldier who is sworn to give up his life, if need be, to defend that very Constitution. We can only characterize these views of the Government as utter nonsense!

The Decision to Surrender Girard to the Japanese Government for Trial

At the hearing before the sub-committee of the Committee on Armed Services, United States Senate, in the case of William S. Girard, held on June 5, 1957, the committee members expressed grave doubt as to the validity and constitutionality of the whole series of acts to which reference is hereinabove made, and as well to the action taken to surrender jurisdiction. Similar doubts and crit-

icism were expressed by many Senators and Congressmen in other hearings to which reference is hereinafter made.

At the June 5, 1957 hearing, it was disclosed that the United States had made a purely "political decision" to turn Girard over to the Japanese authorities for trial and that it was done because of public clamor in Japan. It was revealed further that the American representative in Japan maintained throughout the negotiations with the Japanese government that the United States was right on the law and the facts; that Girard's act was done in the course of assigned military duty and that even under the agreement upon which Japan was relying, the United States was entitled to exercise jurisdiction. Finally the political decision was made in Washington to give in to the Japanese and our Representative was so instructed. The procedure for making any such determination, as provided in the Administrative Agreement, par. XXVI, was not followed.

It was reported, at the Senate committee hearing of June 5, 1957 that the provisions concerning disputed jurisdiction, contained in the agreement, were so drawn that the final decision, as to who shall exercise jurisdiction, is vested solely in Japan and that we as a nation must do as they say —right or wrong. It was also revealed that the Defense Department made the political decision and not the State Department although the latter did acquiesce in the result. The whole series of illegal acts and the artifice by which the Executive branch sought to create treaty rights and obligations without sanction of the United States Senate, was also revealed at this hearing, as well as in earlier hearings (Appendix VI, p. 30a; Appendix VII).

If jurisdiction in criminal cases may be vested by the exercise of the asserted, nebulous, discretionary power of the Executive department, then we are far removed from the basic concepts of the American form of government. What clause in the Constitution, may we ask, authorizes "discretionary political power" to determine criminal jurisdiction over an American citizen and from whence

does it stem? What are the bounds of such claimed discretionary power? Here it is said to have been exercised to satisfy the public clamor of the Japanese people. But since when is that a legal reason and since when has the backbone of the Executive branch been so weakened that we subrogate the rule of law to convenience and placation? These are the issues in this case and not the irrelevant sideshow implanted by Appellants, in the District Court, to the effect that the Japanese government would be more lenient with our military men who commit offenses than would the United States government—a claim which is not true in any event. It is not leniency which Girard seeks but justice under law and within the rules of law as we know them and not as the Japanese would interpret them for us.

Apropos, are the words of the Supreme Court of the United States in the recent case of *Reid* v. *Covert* (701 and 713, October Term, 1956). The quotation from Lord Coke, made centuries ago, comes as a refreshing inspiration in the present day, when a government of the people openly states that it sacrificed one of its citizens for convenience and that it has the unfettered discretionary power to do so. "God send me never", said Lord Coke, "to live under the Law of Convenience or Discretion".

In the *Reid* case, *supra*, this Honorable Court condemned, as unconstitutional, an international treaty designed to confer criminal jurisdiction over American citizens in a foreign land. Mr. Justice Black said: "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land".

The Offense Arose Out of An Act Done in Performance of Official Duty and, for this Additional Reason, is Not Subject to Japanese Jurisdiction

Aside from the unconstitutionality and illegality of the several documents upon which Appellants rely as their source of authority to transfer the body of Girard to the Japanese government for trial, an examination of the text of the documents reveals that the claimed authority is nonexistent and the Respondents are accordingly without power to act.

Assuming the documents to be legal, it appears that the Administrative Agreement of February 28, 1952; the "Protocol of September 29, 1953"; the "Official Minutes to the Protocol"; the "Agreed Views", etc., were all designed to retain primary jurisdiction in the United States for "on duty offenses". Japan agreed that the United States shall have the right to exercise primary jurisdiction over the members of its Armed Forces if the offense arose out of any act or omission done in performance of official duty. Japan also agreed that when a member of the United States Armed Forces is charged with an offense, a certificate by his commanding officer stating that the act arose out of the performance of official duty shall "in any judicial proceedings be sufficient evidence of the fact unless the contrary is proved." Japan further agreed that each state would give "sympathetic consideration" to a request for a waiver of primary jurisdiction but there never was any agreement that such waiver had to be given as Japan insisted. Furthermore there is no law or rule, nor is there any document or treaty which authorizes or directs the Executive to grant a waiver or to accede to Japan's request. Accordingly, it may not be done (*Valentine* v. *United States*, 299 U. S. 5). The government officials advised the Senate, when seeking its consent, that in the case of a guard shooting someone while on Guard Duty, the United States would have exclusive jurisdiction (Appendix II, p. 5a). Now they take the opposite view in order to create a scapegoat to satisfy Japanese public clamor. The right is in the President, they say, to sacrifice a citizen and that right stems

from his powers, as the Chief Executive (appellant's brief, p. 18).

Contrary to the contention of Respondents-Appellants and appellant Dulles in particular, that we would be breaching our agreement with Japan if we do not surrender Girard to that government for trial, it is, in fact, the Japanese government which is breaching the agreement by its assertion of rights which, under the Administrative Agreement and the Protocol, it did not have.

In this case Girard's commanding officer certified that he was acting in the performance of official duty and that the offense complained of arose out of the performance of that duty. These facts were likewise stipulated by counsel for the Respondents-Appellants at the hearing before the District Court. It is undisputed that Girard was on guard duty and assigned to protect United States property in a military area and that there were posters warning trespassers away from the premises. The warning signs read substantially as follows: "Stop. You are violating the Joint Administrative Agreement between the United States and Japan by entering this area. Offenders will be apprehended and taken to the Japanese Police for prosecution in accordance with this agreement". It is undisputed also that the deceased trespassed on to a United States Military Reservation for the purpose of taking property which belonged to the United States and that for the purpose of scaring her and others away, an expended cartridge case was fired, as a warning.

Under the Administrative Agreement and Protocol, as well as under international law and the laws of the United States, the act giving rise to the offense, is one over which the United States has exclusive jurisdiction, and the Executive may not waive it. Japan was arbitrary in asserting rights which, under law and under the agreements, it did not have and is therefore without cause to complain.

The purported power and authority, which the Executive Department has ostensibly enveloped unto itself, is violative of the express provisions of the United States Con-

stitution and is a usurpation of functions allocated to the other branches of this government. Being illegal the exercise of the asserted power has been properly restrained. *Ex Parte Orozco,* 201 F. 106. In the constitutional scheme of things, it is for the courts and this Honorable Court in particular, to compel the President to act within constitutional limitations. *Youngstown* v. *Sawyer,* 343 U. S. 579.

POINT I

The administrative agreement and all documents allegedly executed thereunder are unconstitutional and any action taken by the executive branch of the government under authority of said documents is illegal and void.

The Constitution of the United States provides, among other things, that the power is in Congress "to make rules for the government and regulation of the land and naval forces" (Art. I, Sec. 8, Cl. 14); that the power of the President is to execute the laws—not to make them (Art. II, Sec. 1, Cl. 1)—and "by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur;" (Art. II, Sec. 2, Cl. 2); that there must be equal protection of the laws (Amend. 14, Sec. 1), a rule which is applicable to the Federal as well as the State Governments (*United States* v. *Yount,* 267 F. 861), and that all persons charged with an offense must be afforded due process of law (Amends. 5, 6 and 14). The Constitution provides further that the judicial power of the United States (which includes the interpretation of treaties or executive agreements, *Z. & F. Assets Realization Corp.* v. *Hull,* 114 F. 2d 464, aff'd 311 U. S. 632), is vested in the courts (Art. III, Sec. 2).

By reason of the division of powers under the Constitution, all branches of our government may act only in their own defined sphere. *United States* v. *Johnson,* 53 F. Supp. 167, aff'd 175 F. 2d 612. Congress and the President, like

the courts, have no power not derived from the Constitution. *Ex parte Quirin, supra.* We pose the direct question which is the major issue in this case; on what section of the Constitution does the government rely, as its source of authority to determine criminal jurisdiction over the men in our armed forces and from where does it obtain authority to waive the court-martial jurisdiction which was established by Congress?

The Executive branch of the government was never vested with power to make laws or agreements to confer or withhold criminal jurisdiction. Where does that authority come from now? Treaties and executive agreements like any other contract or statute are finally construed by the courts, not by the executive. *Leavenworth L. & G. R. Co.* v. *United States,* 92 U. S. 733. It is the court's determination which is binding and any political decision as to meaning or interpretation of a treaty or contract is not binding on the judiciary. *Sullivan* v. *Kidd,* 254 U. S. 433; *Valentine* v. *United States, supra.*

An "Administrative Agreement" or a "Protocol" with or without "Minutes" attached, or an expression of "Agreed Views" certainly cannot be considered as law particularly when it deprives a citizen of constitutional rights. *The Cherokee Tobacco,* 78 U. S. 616, 620; *Geofroy* v. *Riggs,* 133 U. S. 258, 267; *Reid* v. *Covert, supra.* Even an alien may not be deprived of his legal rights by Executive decree or political decision. *Ex parte Orozco, supra.*

The Administrative Agreement and subordinate documents on which respondents-appellants rely to sustain the claimed Executive authority were not entered into in conformity with the provision of the Constitution. The making of said Agreements was, in fact, a usurpation of power by the Executive and constitutes an invasion of the prerogatives of the Congress and the Senate as declared and defined by the Constitution. This encroachment, if permitted to go unchallenged, constitutes a dangerous precedent under which, at any other time, the Executive may deny a citizen the equal protection of the laws and due process of law.

Many times during the past 175 years, the warning signals, concerning usurpation of power, were posted.* Only recently this Honorable Court, in its courageous and memorable opinion, repeated the same warning (*Reid* v. *Covert, supra*):

> "Slight encroachments create new boundaries from which legions of power can seek new territory to capture." It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. * * * Ours is a government of divided authority on the assumption that in division there is not only strength but freedom from tyranny. * * *

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* In his immortal farewell address, President Washington with sound judgment and profound insight, discussed the separation of the powers of government in the following statement:

> "It is important, likewise, that the habits of thinking in a free country should inspire caution in those entrusted with its administration, to confine themselves within their respective Constitutional spheres; avoiding in the exercise of the Powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create whatever the form of government, a real despotism. * * * If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield."

While not necessary to a determination of this case, it is the appellee's contention that even had the Administrative Agreement and Protocol been entered into "by and with the advice and consent of the Senate," it nevertheless would have been violative of the United States Constitution.

The power to make rules for the government and regulation of our Armed Forces is exclusively in the Congress. *Dynes* v. *Hoover*, 61 U. S. 65; *Toth* v. *Quarles*, 350 U. S. 11; *McCune* v. *Kilpatrick*, 53 F. Supp. 80 83; *Reid* v. *Covert*, *supra*. This includes the power to define and punish offenses, to determine jurisdiction, modes of procedure, and review. *Grafton* v. *United States*, 206 U. S. 333; *Hiatt* v. *Brown*, 339 U. S. 103. Congress, acting within the prescribed sphere of its constitutional authority enacted the Uniform Code of Military Justice (Act of May 5, 1950) wherein it was provided, among other things, that the "Code shall be applicable in all places" (Article 5); that jurisdiction to try offenders be vested in courts-martial (Article 18); that no member of our Armed forces shall be confined with enemy prisoners or other foreign nationals (Article 12) etc.

Congress having acted in the field reserved to it by the Constitution, the other branches of government are without authority to modify or change such congressional enactment. Nor can the President, or the President and the Senate combined, make change by executive agreement or treaty. *Toth* v. *Quarles*, supra. Such treaty would be an invasion of power reserved to the House of Representatives and the Senate combined, and therefore invalid. *Geofroy* v. *Riggs*, supra; *Holden* v. *Joy*, 84 U. S. 211; *Whitney* v. *Robertson*, 124 U. S. 190; *Reid* v. *Covert*, supra,

Since Congress alone has the power to determine jurisdiction in cases involving the military forces, the President may not make a treaty which denies that power and the Senate may not give sanction thereto. In matters relating

to military jurisdiction and Rules for the government of our armed forces, the Senate may act only in conjunction with the House of Representatives (U. S. Const. Art. I, Sec. 8, cl. 14)—and then only within the framework of the Constitution.

The language of Mr. Justice Black in *Reid* v. *Covert*, supra, is here particularly appropriate. He said: "• • • It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI [of the Constitution] as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V [of the Constitution]. *The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.*

There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a Treaty. • • • •" (Italics supplied.)

In the instant case the President acted without the Senate. Through subordinates he took it upon himself to make the laws for the government of the Armed Forces. His first act was a so-called "Administrative Agreement" followed by a whole series of maneuvers which it is now claimed constitutes "law". Indeed it is not "law" in common everyday parlance and certainly not law of the type envisioned by the Founding Fathers of this Republic. In a sense the decrees of a dictator or the chief of a savage tribe are law—because they have binding force, but such is not law as we understand it under our constitutional form of government. The government shies away from the word "law" and, by circuitous reasoning, argues that Girard's life may be snuffed out or his liberty taken away by a "political decision not subject to judicial review"—

whatever that means! The only method Appellee knows whereby one may be deprived of life, liberty or property, is by "due process of law"—all chatter and circumlocution to the contrary notwithstanding.

The mess we have gotten into and the vast legal problems which our servicemen, as well as the government officials, must face because of Executive encroachment upon fields outside his domain, are reported at length in the many hearings on the subject had before Congressional Committees. There is also contained in these hearings considerable discussion respecting the unconstitutionality and illegality of the Executive agreements designed to transfer jurisdiction over our Armed Forces to foreign governments. Extracts from these hearings are contained in the appendices hereto attached (Appendices II, III, V, VI, VIII).

Time does not permit of a detailed study and analysis of the far-reaching effect which these agreements have had and will have on the rights of American citizens in almost every country of the world. Some of these agreements are secret. Most of them were never referred to the Senate. Only in the case of the NATO nations was Senate approval sought several years after the event. The Senate approved with reservations on the occasion when the Status of Forces Agreements were submitted to it as part of the overall NATO treaty (Appendices III, VI).

In the case of Japan the consent of the Senate was neither sought or obtained. Constitutional requirements have obviously been violated and many Senators have condemned the agreement with Japan and others as unconstitutional. United States Senator, John W. Bricker, went so far as to infer that several government witnesses appearing before Congressional Committees were giving false and misleading information on both law and fact (Appendix VI). He said that some of the arguments advanced in support of the agreements were "fantastic"; that the making of the "secret" agreements as well as the others designed to transfer jurisdiction was a flagrant

violation of constitutional power vested in Congress; that in some of these agreements diplomatic immunity in varying degrees was given to officials of our government along with their staffs, while at the same time immunity of the military man from foreign jurisdiction, which existed from time immemorial, was taken away.

Referring to Japan specifically, Senator Bricker said:

> "Is there a Senator among us who can describe criminal law and procedure as it actually operates in Japan * * *."
>
> "It is not enough merely to look at excerpts from the constitutions and laws of other countries. Many fine phrases are qualified by other provisions effective in national emergencies proclaimed by the authorities. There is not one United States Senator who really knows the type of trial given to persons accused of crimes in all the NATO countries and Japan.
>
> The hearings do not mention how prisoners are treated in NATO countries and in Japan. We know that confinement by our own military authorities takes place under conditions that are humane and sanitary. Will the Senate Foreign Relations Committee certify to the American people that the same conditions prevail in the penal institutions of NATO countries and Japan?
>
> If Americans, by reason of their unique respect for fundamental human rights, are a special or privileged class, they have not shirked their responsibility to people less fortunate. Billions of dollars have, for example, been poured into NATO countries. That contribution would have been impossible without the concept of freedom which distinguishes Americans from other people. Reasonable and honest men may differ in regard to the number of dollars Congress may give away with safety. But to give away the rights of Americans serving in the uniform of their country is unthinkable" (Appendix VI).

The argument is made that these agreements, even the secret ones, are to our advantage; that we must enter

into these pacts with foreign governments in order to maintain bases on their soil; that we cannot backtrack what has already been done; that we may not dishonor our agreements; and in the case of Japan, the United States would be embarrassed if we do not surrender Girard, etc. All these arguments may go well in a political arena or a high-school debate. We are, however, here confronted with legal problems in a judicial forum where the issue is one of law focused directly at the heart of constitutional government. If, as appellee contended, the administrative agreement to surrender jurisdiction, flaunts Constitutional provisions, then it must be declared unconstitutional. Neither Japan nor any other nation may have cause to complain because all nations know and are presumed to know, that no agreement with the United States has any binding force unless made within the limits of power vested by the Constitution in the Executive and the Senate. Just as individuals are presumed to know the law so are nations presumed to know the extent of the treaty making power of the government with which they are negotiating.

VIEWS EXPRESSED BY THE OFFICIALS OF THE GOVERNMENT BEFORE CONGRESSIONAL COMMITTEES: One of the legal advisors for the State Department testified that he could see no difference, legally or otherwise, between an American tourist voluntarily entering the territory of a foreign nation and a soldier drafted into our Armed Forces who was assigned overseas to perform military duty (Appendix II, p. 8a; Appendix III, p. 12a).

Others testified that the Executive branch of this government may enter into secret agreements with foreign powers on the subject of jurisdiction over our Armed Forces and that they could see nothing wrong with it. The secret Yalta agreement made during the war, when possibly it was a wartime precaution, was much criticized but now, in the opinion of some government officials, including the President of the United States, secret agreements are not to be

criticized. But how is the individual soldier to know, on the basis of unpublished secret documents, the nature of the criminal jurisdiction which may be exercised over him? Wherein are secret documents within the framework of the United States Constitution? The record of these Congressional hearings are replete with expressions and views of government officials which have a strange sound to anyone familiar with even the most elementary principles of Constitutional law. Many Senators and Congressmen have characterized all the so-called Status of Forces agreements, as unconstitutional and illegal and indicated their disapproval of the Government's position. (Hearings, Senate Committee on Foreign Relations, April 7th and 8th, 1953; Supplemental Hearings, Senate Committee on Foreign Relations, June 24, 1953; Hearings, House Committee on Foreign Affairs, July 13th, 14th, 20th, 21st, 26th, 1955 and January 31st, February 1st, 2nd, 1956; Hearings, subcommittee Senate Committee on Armed Services, 84th Cong., 1st sess.; ibid., 84th Cong., 2nd sess.; ibid., 85th Cong., 1st sess.; Hearings, House Committee on Foreign Affairs, 84th Cong., 1st sess.)

The government seeks to uphold the legality and constitutionality of these agreements on the theory "that the President had power, as Commander-in-Chief to take such action" (Appendix VI; appellant's brief, p. 48). A similar contention was struck down in *Youngstown* v. *Sawyer, supra.* In the *Youngstown* case, property was involved. Here life and liberty are involved. Appellants point to the case of *Cozart* v. *Wilson*, 236 F. 2d 732; cert. denied for mootness, 352 U. S. 88. In that case this Honorable Court granted certiorari and directed that the judgment of the Court of Appeals be vacated. In the Court of Appeals the government relied on *In re Ross*, 140 U. S. 453, which case this court recently characterized as a "relic from a different era." Then other cases on which the government there relied were given burial by this Honorable Court in *Reid* v. *Covert, supra.*

The present day argument that the Executive has unlimited power and authority to take discretionary political action respecting the life and liberty of the men who serve in our Armed Forces in foreign lands (Appendix VII) and that the propriety of such action may not be reviewed by the Courts has overtones of tyranny and it is devoid of merit. *Ex Parte Orozco, supra.*

In this case the Constitution of the United States has been violated, the agreement to surrender Girard to the Japanese government for trial is illegal and this Honorable Court should so declare.

POINT II

An army in the territory of a foreign nation is not subject to the criminal laws of that nation whether it entered by force or by consent.

Under International Law, reaffirmed time and time again by the Courts of this country and by Courts of other nations, the rule is stated that visiting troops in a friendly sovereign's territory are immune from the criminal jurisdiction of the territorial sovereign. *The Exchange,* 11 U. S. 116; *Coleman* v. *Tennessee,* 97 U. S. 509; *Dow* v. *Johnson,* 100 U. S. 158; *Tucker* v. *Alexandroff,* 183 U. S. 424; *Hamilton* v. *McClaughry,* 136 F. 445; Hyde, *International Law as interpreted by the United States,* Vol. I, Sec. 247; Archibald King, *Jurisdiction over Friendly Foreign Armed Forces,* 36 A. J. I. L. 539 (1942) and 40 A. J. I. L. 275 (1946); Lauterpacht, *Oppenheim's International Law,* 7th Ed. (1948) Secs. 127, 386, 443, 445; Hackworth, *Digest of International Law,* (1941) Sec. 169; Moore, *Digest of International Law,* Secs. 250, 251; Lawrence, *Principles of International Law,* Secs. 107, 246; Wigmore,

Extraterritorialty of U. S. Armed Forces Abroad, 29 Amer. Bar Assoc. Journal 121; Phillimore, *Commentaries Upon Int. Law*, (3rd Ed.), p. 474; Vattel, *The Law of Nations*, (Fentwick Translation), pp. 274-6; Wheaton, *Elements of International Law*, (1929) Sec. 95; Hall, *International Law*, Sec. 56; *The Gilbert Case*, #1520, *Supreme Court of Brazil* (1944); *Republic of Panama* v. *Schwartzfiger*, 24 Registro Judicial (Panama, 1926) 722; *Casa Blanca* case, Permanent Court of Arbitration at the Hague, 3 A. J. I. L. 755 (1909); *Amrane* v. *John*, 1931-32 Ann. Digest 133, (Div. Tribunal, Alexandria, Egypt); *Dizon* v. *Commanding General*, G. R. No. L-2110, July 22, 1948 (Supreme Court, Philippines); *Wright* v. *Cantrell*, 1943-45 Ann. Digest, (Sup. Ct. New South Wales), 44 New S. Wales Rep. 45 (1943); Manual for Courts-Martial, United States, (1951) Par. 12; Winthrop, *Military Law & Precedents*, 2nd Ed. (1920 reprint) pp. 81-82.

The same principle is taught in the United States Military Academy at West Point. See *Constitutional Powers and Limitations*, pub. by Dept. of Law of the U. S. Military Academy, 1941. It is therein stated:

> "• • • all members of the United States Army are subject to the jurisdiction of its court-martial. Yet, while the army is within territorial limits of the United States the civil courts, both Federal and State, have certain *concurrent* jurisdiction over its members • • • However, the jurisdiction of courts-martial becomes *exclusive* when the Army leaves its own territorial limits, as for instance, when the Army marches through a *friendly country* or is stationed therein. *In such cases, consent of the friendly government for exemption from its civil and criminal jurisdiction is assumed as a matter of course; should it deny this consent and act otherwise, it would give rise to serious consequences.*" pp. 109-10. (Italics supplied.)

In *Hamilton* v. *McClaughry*, *supra*, at p. 448, the Court said:

> "Under the well-settled principles of law the offenders so tried [persons in the armed forces of

> the U. S.] were not amenable to the laws of the government of China, and the offenses by them committed, if any, whether by the laws of this country denominated as the crime of murder, robbery, larceny, or other felony, were not committed in violation of any law of China, because done by persons in the military service of this country while stationed in China."

In *Coleman* v. *Tennessee*, *supra*, at pp. 515, 16, this Honorable Court said:

> "It is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place. The sovereign is understood, said this court in the celebrated case of *The Exchange* (7 Cranch, 139), to cede a portion of his territorial jurisdiction when he allows the troops of a foreign prince to pass through his dominions: "In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force."

The authorities on International Law and the decided cases are almost unanimous in acceptance and recognition of the above stated rule of law, except Attorney General Brownell and Solicitor General Rankin, both of whom aim to support the President's agreements on the status of forces and Mr. M. L. Schwartz, assistant to Mr. Brownell, who wrote the Department of Justice Memorandum de-

signed to overturn the established rule. (see 53 Columbia Law Review 1091, December 1953).* However much they may desire to change the rule to their own liking, no amount of distortion or fallacious reasoning—regardless of the number of times it is repeated or how loudly it is asserted—can change what has been the established law since time immemorial. The memorandum which they submitted to the Senate Committee on Foreign Relations (Supplementary Hearings held June 24, 1953) is a masterpiece of sophistry designed to mislead and confuse. This is the view of several members of Congress and, if true, we mince no words in condemning it.

The position, that our armed forces fell completely under the yoke of the nation in which they were stationed, was taken in order that it may be asserted that these wholly illegal and originally clandestine administrative agreements, gave us something we did not have before, when, in fact, these agreements are nothing but a shameful surrender of our rights as a sovereign power. A reading of the record of the Congressional Committee hearings will reveal what the truth is. An extract of what was said and the disturbing views, expounded by some of the government witnesses, who appeared before the Congressional Committees, are contained in the Appendices attached.

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* Appellants refer (Appellants' Brief, page 32) to the writers on international law, even those whom this Honorable Court has cited as authority, as only "theorists"—implying that they are not to be relied upon. Recently these Appellants have asked the United States Senate to regard as authority the writings of Mr. M. L. Schwartz. Is he not also a "theorist"—a little less known perhaps? While they characterize as "theorists" world renowned authors whose writings support Appellee, they point to the same authors for legal precedent when their writings appear to support them. Throughout Appellants' brief, these authorities on international law are pointed up as being entirely reliable except the writings wherein they cite the rule—that friendly forces in the territory of a foreign nation are not subject to the criminal or civil laws of that nation.

POINT III

Territorial jurisdiction over Camp Weir is in the United States. Under international law and by agreement Japan has granted immunity from exercise of sovereign rights over the area.

Camp Weir, where the offense is alleged to have been committed, is a United States military installation. It fell to the United States and the Condominium of the Allied Powers by virtue of conquest and the unconditional surrender of Japan, at the close of World War II. It has been retained by the United States Military Establishment continuously from April 11, 1946. At that time, the United States and the condominium of powers were exercising sovereign rights over all of Japan. Camp Weir, at the time of the occurrence of the offense on January 30, 1957, was being used solely by the United States Forces. It had been and was at the time a territory which was immune from the jurisdiction of the government of Japan (Appendix IX).

Appellants point to the provisions of Chapter I, Article 1 of the September 8, 1951 Treaty of Peace with Japan, under which, the allied powers recognized the sovereignty of the Japanese people over Japan and its territorial waters. However, *simultaneous* with the signing of the Peace Treaty, a Security Pact was entered into between the United States and Japan wherein the United States alone was granted the right of retaining its "land, air and sea forces in and about Japan." Control over the Camp Weir area was continued in the United States, where the American flag had flown since almost the time of conquest.

Prior to the Peace Treaty, the sovereignty of Japan was, as a matter of International Law, vested in the Condominium of the Allied Powers by virtue of conquest and

unconditional surrender. *Flick* v. *Johnson*, 174 F. 2d 983. This rule of international law was reaffirmed in the judgment of the International Military Tribunal for the Far East and the other Allied War Crimes Courts, which judgments, Japan agreed to recognize under the provisions of Article XI of the Peace Treaty. The sovereignty which the United States, along with the Condominium of Allied Powers, exercised over Japan continued until the coming into force of the Peace Treaty on April 28, 1952.

Upon the coming into force of the Peace Treaty, the sovereignty over Japan was returned to the Japanese people *with reservations* contained in the Security Pact made between the United States and Japan. The Security Pact and the Peace Treaty were simultaneously executed. The Security Pact limited the extent of the land area which would revert to Japanese sovereignty and, the areas over which the United States was to continue to exercise control, was to be spelled out by Administrative Agreement. Such agreement was entered into on February 28, 1952 and became effective simultaneously with the coming into force of both the Peace Treaty and the Security Pact, namely, April 28, 1952.

Article II, Par. 3 of the Administrative Agreement reads as follows: "3. The facilities and areas used by the United States armed forces shall be returned to Japan whenever they are no longer needed for purposes of this Agreement, and the United States agrees to keep the needs for facilities and areas under continual observation with a view toward such return." Article III reads: "1. *The United States shall have the rights, power and authority within the facilities and areas* which are necessary or appropriate for their establishment, use, operation, defense or control. The United States shall also have such rights, power and authority over land, territorial waters and airspace adjacent to, or in the vicinities of such facili-

ties and areas, as are necessary to provide access to such facilities and areas for their support, defense and control. In the exercise outside the facilities and areas of the rights, power and authority granted in this Article, there should be, as the occasion requires, consultation between the two Governments through the Joint Committee." (Italics supplied.)

It is the contention of the appellee that, by virtue of the agreements which went into effect on April 28, 1952 and the international law relative to acquiring sovereignty by conquest, and the return thereof, that full sovereignty was not restored to Japan but continued in the United States over certain specified areas and facilities. Those areas and facilities are spelled out by agreements. Camp Weir is included (Appendix IX).

For the purposes of this case, it is not necessary to maintain that "sovereignty" as such, continued in the United States over these areas because when the consent of the Japanese government was given to the United States to operate and maintain areas and facilities within the territorial bounds of Japan it thereby granted immunity to the United States from the exercise of Japanese jurisdiction over those areas. This is not a new principle of law. It is recognized in the United States in the relationship between the States and the Federal government. The relationship between the States and the Federal government is akin to the relationship between nations (Appellant's Brief, p. 58). The above doctrines, re sovereign rights, are recognized in the common practice involving the establishment of Embassies and the entry of ships flying a foreign flag into the territorial waters of another nation. *United States* v. *Flores,* 289 U. S. 137.

In the framework of our own national government, each State is sovereign within its own boundaries except insofar as it cedes to the Federal government the right to maintain facilities, military, postal and others within the area of the State. When the State consents and imposes no re-

striction, the jurisdiction, criminal and civil, vests exclusively in the Federal government. United States Constitution, Article I, Sec. 8, Cl. 17.

The rule of exclusive criminal jurisdiction over an area ceded to the Federal government for its use was reaffirmed in *People* v. *Hillman*, 246 N. Y. 467. In that case a crime was committed on the West Point Military Reservation which is located wholly within the territorial bounds of the State of New York and which is used as a United States Military Academy. The Court of Appeals said: "If the crime in fact occurred at a place purchased "by the consent of the Legislature" of the State of New York and used as the West Point Military Reservation, then the trial must be held according to the laws made by the United States Congress and before a tribunal selected by it" (p. 472). The rule is the same if the area is purchased, rented or just used with consent.

Under international law the same doctrine of immunity from the jurisdiction of the local sovereign has been recognized. Not only is the person of the Ambassador, his accredited agents and servants immune from the sovereign laws of the country to which he is assigned, but his personal property and the buildings and area used by him in the performance of his governmental function are likewise immune. *Frend* v. *United States*, 100 F. 2d 691; *Diplomatic Immunity to persons and property*, 26 A. J. I. L. 50; *Ex Parte Cabrera*, 4 Fed. Case No. 2,278. The same rule applies to the ships of one nation entering the territorial waters of a foreign nation. Such a ship is considered a part of the territory of the nation to which she belongs. *United States* v. *Flores, supra; Wildenhus' Case*, 120 U. S. 1.

Armed Forces entering upon or stationed in a foreign country have always been immune from the civil and criminal jurisdiction of such foreign country. The facilities used and the land area occupied was likewise immune from local

jurisdiction. Few cases involving immunity of facilities and land area appear to have arisen under international law probably because the personal immunity was in itself a solution to the problem. Here, however, the government contends that there was no personal immunity, under international law inuring to our soldiers in a foreign country. Appellee contends that, not only was there personal immunity, but that there was territorial immunity as well, since the event occurred in an area which was either under the sovereign control of the United States or over which the Japanese government consented to have the United States exercise control. The giving of such consent carries with it the surrender of Japanese jurisdiction over the area. Japan would have no right to exercise jurisdiction over an offense committed, for example, in the American Embassy in Tokyo or one committed aboard an American ship plying the water of Japan.

Unfortunately, time does not permit a more detailed study of the international law problem here involved. On general principles, it would appear that there is something incongruous about inviting the American forces to the Island of Japan to protect that Island from outside aggression (See Preamble to Security Treaty), to grant to the United States the right of user of certain areas and at the same time assert that there was no immunity—personal or territorial.

What if Girard, instead of guarding government property, at Camp Weir, were assigned to guard secret documents in our Embassy building in Tokyo and in so doing caused the accidental death of a prowler, within the building, whom he tried to scare away? Would the Japanese have jurisdiction in such a case? Legally there is no distinction.

POINT IV

Exclusive jurisdiction over offenses committed in the course of assigned duty by persons in our armed forces is in the United States. This is the rule even though the act complained of violated the laws of the territory as well as the military code. Surrender to a foreign jurisdiction to punish for an offense committed in performance of military duty is contrary to United States policy and unauthorized in law.

Persons acting in the course of duty as an agent of the United States are accountable only to United States Federal jurisdiction for alleged unlawful acts, civil or criminal. *In re Neagle*, 135 U. S. 1. This is the rule and the policy of the United States as expressed by statutes. It is applicable to persons in or out of military service (28 U. S. C. 1442, 1442a). In cases involving military personnel, a Court-Martial is the appropriate United States tribunal. *United States* v. *Daniels*, 279 F. 844.

This is the rule even though there may be concurrent jurisdiction and the act complained of is violative of both the law of the territory and the military code. Other nations apply the same principle. *Brown* v. *Cain*, 56 F. Supp. 56; *In re Fair*, 100 F. 149; *Petition of Drury* v. *Lewis*, 200 U. S. 1; *United States* v. *Lipsett*, 156 F. 65; *In re Wulzen*, 235 F. 362; *Petition of Delgado*, 57 F. Supp. 460; *Colorado* v. *Maxwell*, 125 F. Supp. 18. See also, Opinion of Honorable Joseph C. McGarraghy in the instant case, wherein many authorities are cited and the cases relied upon by the Government distinguished.

The Uniform Code of Military Justice, designed to govern the Armed Forces of the United States provides: "This code shall be applicable in all places" (Article 5). This means all places and not continental United States only and the Executive branch of the government is without

power to vary the terms of that code by administrative agreements, protocols, or in any other manner. *Swain* v. *United States*, 28 Ct. Cl. 173, affd. 165 U. S. 553; *Talbott* v. *United States*, 215 F. 2d 22, reversed on other grounds, 350 U. S. 11. The Executive is likewise without power to surrender for convenience, appeasement, political expediency, or otherwise, any citizen of the United States or other person, to any foreign government for trial without express authority by law or treaty. *Valentine* v. *U. S.*, *supra*; *Artukovic* v. *Boyle*, 107 F. Supp. 11; *Shachtman* v. *Dulles*, 225 F. 2d 938, and the Executive branch of the government has no inherent power to do so. *Youngstown* v. *Sawyer*, *supra*; *Tucker* v. *Alexandroff*, *supra*; *Geofroy* v. *Riggs*, *supra*; *Whitney* v. *Robertson*, *supra*. Even if no "performance of duty" problem is involved, the military personnel of one nation may not be surrendered to the claiming nation unless a specific *valid* treaty covers the subject.

The main prop of Appellants' argument is that, even if there is immunity in the visiting force, jurisdiction may be waived by agreement and that the President acting within the scope of "plenary powers" vested in him, may waive jurisdiction, if waiver provisions are contained in the agreement. Ordinarily, nations may contract to disregard a rule of international law and to be governed by treaty stipulations only. Insofar as the United States is concerned, the making of such a contract must conform to constitutional requisites and relate to a matter which is not within constitutional prohibitions. If even a validly executed treaty, encroaches upon rights which the Constitution guarantees to the individual then, to the extent that it does so, it is invalid. *Reid* v. *Covert*, *supra*. What other nations may or may not do is no criterion for the course which this nation must follow by constitutional directive.

POINT V

No citizen of the United States or any person subject to the control of the United States may be delivered or surrendered by the authority of the United States to any foreign government for trial of an alleged offense unless a valid treaty of extradition so directs.

In the international sense, extradition may be defined as the surrender by one nation having control over an individual accused of crime to another so that the latter may punish for an offense which was committed within its boundaries. *Terlinder* v. *Ames*, 184 U. S. 270; *Fitzpatrick* v. *Williams*, 46 F. 2d 40.

The right of one independent government to demand and receive from another the custody of an offender rests solely on the existence of treaty stipulations between them. *U. S.* v. *Rauscher*, 119 U. S. 407; *Artukovic* v. *Boyle, supra.*

While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender an accused and it may be under a moral duty to do so, the legal right to demand him and the correlative duty to surrender him to the demanding soverign exists only when created by treaty. *Valentine* v. *United States, supra; Factor* v. *Laubenheimer*, 289 U. S. 713, affd. 290 U. S. 276; *United States* v. *Rauscher, supra.*

In the absence of an extradition treaty, directing that a person be surrendered, the Executive has no power to turn him over to a foreign government since no discretionary power exists. *Valentine* v. *United States, supra.*

Whether the Executive may surrender a person to a foreign government for trial is a judicial question. *In re Lucke*, 20 F. Supp. 658; *Neely* v. *Henkel*, 180 U S. 109; *Bernstein* v. *Gross*, 58 F. 2d 154; *Artukovic* v. *Boyle, supra.*

Referring to the surrender power, this court in the case of *Holmes* v. *Jennison*, 39 U. S. 540, said, in effect, that in the United States, the general opinion has been, and practice has been in accordance with it, that in the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power. Chief Justice Taney also crystalized in that case the rule that as the rights and duties of nations toward one another, in relation to fugitives from justice, are a part of the law of nations and have always been treated as such by the writers upon public law, it follows that the *treaty making power* [the Executive, acting with the advice and consent of the Senate] must have authority to decide how far the right of a foreign nation in this respect will be recognized and enforced, when it demands the surrender of anyone charged with offenses against it. See also Moore, *On Extradition*, Vol. 1, Page 21; Vogt, *Foreign Relations* (1873), Part 1, Page 81.

In *Tucker* v. *Alexandroff*, *supra*, 431, it was said: "In Moore on Extradition (Sec. 408,) it is laid down as a general proposition that, in the absence of a treaty, the surrender of deserting seamen cannot be granted by the authorities of the United States; and an opinion of Attorney General Cushing (6 Op. 148,) is cited upon that point. There is also another to the same effect. (6 Op. 209.) It is believed that in all the instances which arose between the United States and Great Britain prior to the treaty of 1892 for the reclamation of deserting seamen, both powers have taken the position that in the absence of a treaty there can be no reclamation. Several instances of this kind are cited by Mr. Moore in his treatise."

The construction of an extradition treaty is for the courts and they are not bound by the construction placed thereon by the executive or by the construction placed thereon by the foreign country with whom the treaty is made. *Ex parte Charlton*, 185 F. 880, affirmed *Charlton* v.

Kelley, 229 U. S. 447. The same is true of the administrative agreement and protocol in this case.

The Defense Department was without power to surrender Girard or waive any right which affected him because (1) there is no Legislative provision or Treaty directing or permitting it; (2) there was no express authority to do so in the Administrative Agreement or Protocol; (3) no procedure was provided; (4) to do so would be in contravention of the legal meaning of the words, act done "in performance of official duty" contained in the Protocol; (5) because political reasons and political decisions of expediency are not laws; and (6) because the persons, acting on behalf of the Defense Department in this instance exceeded the scope of their agency. See hearing before sub-committee Senate Armed Forces Committee held June 5, 1957, in the case of William S. Girard.

Upon principles of international law and, independent of statutory provisions or treaty stipulations, courts of justice are neither bound nor authorized to remand persons for trial to a foreign government whose laws they are supposed to have violated. *U. S.* v. *Davis*, Fed. Case No. 14,932. A foreign government has no right to demand of the government of the United States the surrender of one of our citizens or a citizen of such foreign government, unless there are specific provisions in a *valid* treaty to which it may point. Such right to demand extradition has no existence without, and can only be secured by, a treaty stipulation. *Ex parte McCabe*, 46 F. 363; *Valentine* v. *United States, supra.*

The United States Government has never acknowledged the right of foreign nations to demand the surrender of a person charged with crime or a fugitive, independent of Treaty stipulation. *In re Fitter*, 23 N. J. Law 311. The President would not be justified in directing the surrender of a person in order that he may be brought to trial in the country where he is supposed to have committed an offense, when there is no stipulation to that effect by Treaty between the two governments (1831, 2 Op. Atty. Gen. 452).

The Appellants assert that the laws respecting extradition are not here applicable first, because Girard is in Japan and it is not sought to take him from the United States and second, because absolute authority is in the Defense Department, under Article 14, Uniform Code of Military Justice, to surrender any soldier to any government anywhere in the world, to answer criminal charges (Appellants Petition for Certiorari, pp. 24, 25). Both contentions are without merit. Extradition is designed to take an individual from the *control* of the government to which the request is directed. Usually, control exists because the person sought is within the territorial limits of the nation upon which demand is made. But what of a case where an American citizen takes refuge in one of our Embassy buildings? Unless there is a valid extradition treaty, we do not have to surrender him. It is *control* which is the important factor and not the territory where the person happens to be. Girard is now in the control of the U. S. Government on a U. S. military base in Japan. The Japanese authorities may not enter our military base to seize him and the Executive may not surrender him except pursuant to some statutory or treaty provisions which requires or permits him to do so.

As for the power, which Appellants say exists by virtue of Article 14, UCMJ, a study of the legislative history of this article indicates that it was intended to apply only within continental United States. Secondly, delivery to the State or County civil authorities of the U. S. is authorized only "subject" and pursuant to "such regulations as the Secretary of Defense may prescribe". No such regulations have been prescribed and the Defense Department is not empowered to act arbitrarily. Thirdly, if Article 14 were intended to vest arbitrary power in the Department of Defense or other department of this government to deliver American soldiers to a foreign government for trial without any limitations as Appellants contend, then Article 14, UCMJ, is unconstitutional, the same as the other provisions of this Code, already so declared by this Court. *Toth* v. *Quarles, supra; Reid* v. *Covert, supra.*

POINT VI

The position of the appellants is untenable and destructive of constitutional rights.

Predicating authority on vague and nebulous powers allegedly vested in the Executive Department, attempt was made to deliver Girard to the Japanese government for trial. It is asserted that no extradition is necessary and that no judicial hearing may be afforded to determine the propriety of such action; that the President has the exclusive right to make "political decisions"; that jurisdiction is a political matter under the self-executed agreement made with Japan and that there must be no breach of that agreement. Japan, on the other hand, must know that no Agreement or Treaty with the United States is valid without ratification, *In re Sutherland*, 53 F. 551, and that our law does not permit ratification by implication. *Gelston* v. *Hoyt*, 16 U. S. 246; Taylor, *International Public Law*, Sec. 364.

Power to act is one thing, and the propriety of the exercise of that power is another. Certainly, the Executive, through the military has it within his power to act, regardless of the illegality of the action, but if the so-called Administrative Agreement is valid, what would happen in the event Girard was either outside of military control or had returned to the United States? If, as appellants contend, the agreement is valid and we must honor it by delivering Girard to the Japanese authorities for trial, they must also argue that they may enter Girard's home in Illinois, and remove him therefrom for delivery to the Japanese authorities. There is nothing in any of the documents making the time or place of seizure a determining factor in so far as obligation to return him is concerned.

If, as appellants contend, he is not entitled to a judicial hearing while in Japan, he is not entitled to a judicial hearing while he is in the United States. That being so, he could be removed from his home and turned over to a

foreign government merely on a "political decision" of the Executive. It is hard to believe but this is the contention of the Appellants and if there is any merit to it, the Soviet Gestapo system begins to loom mild by comparison.

It is also incredible to appellee's counsel that an officer of the United States would assert before a court of the United States that a citizen's rights may be determined by a "political decision" of the Executive. The asserted power, pursuant to which the Executive seeks to sacrifice the person of Girard to satisfy Japanese public clamor, must also encompass the right to whisk Girard out of his native state and country. It has been contended that we are overstating the appellants' position, but at what point, territorially, does the power cease? When Girard is one mile off the coast of Japan? When he is midway over the Pacific Ocean? Or when he touches American soil?

Japan has tried and imprisoned more of our soldiers than any other nation in the world (Senate Armed Services Committee Hearings, April 9, 1957). The horrible conditions under which they are confined are in only a small degree described in an article published in the American Legion Magazine, January, 1957 issue entitled: *"We learned about Jap prisons from the inside."* It is not pleasant reading. Of course, General Hickman says that the "allegations are not well founded." He admitted, however, that American soldiers were imprisoned under conditions which appeared to be a violation of Article 12 of the Uniform Code of Military Justice and that "there are specific unresolved problems [respecting imprisonment] in some countries. * * *" Report of Hearings before Subcommittee, Senate, Armed Services Committee, April 9, 1957.

The self-invested authority to make law by administrative agreement, under which citizens of the United States may be forcibly delivered to foreign courts for trial in violation of their most fundamental constitutional rights, and denied access to their own courts on the ground of unlimited

and uncontrolled "political" power is not tenable and not one which should find favor in our courts. This is absolute dictatorship and should be condemned. (see Appendix I): "Power corrupts—Absolute power corrupts absolutely."

To illustrate further, how utterly untenable the position of the government is from the standpoint of American prestige and honor, a hypothetical case will be conjectured. Assume that instead of Girard, a high ranking staff officer of our Far Eastern Command were involved. It is not without the realm of foreseeable possibility that he may attempt to scare away trespassers gathering for themselves property which belonged to the United States and that in so doing, he fired a blank cartridge which results in the death of a Japanese national. After the event and to make political capital, the same clamor for trial before a Japanese Court is stirred up and the Japanese government takes the same adamant position which was taken in this case. The final determination as to who shall exercise jurisdiction is with the Japanese as hereinabove indicated. Must we surrender this officer to the Japanese for trial or will the Executive head of this government make one "political decision" for the officer and another for the foot-soldier? Both fall within the identical provisions of the agreement which it is said the Executive made with Japan. But we do not have to use the pattern of the Girard case as an example. Another would be simpler and equally within the range of possibility. Assume, an officer on a non-duty status, or the Commanding General himself, while driving an automobile, injured or killed a Japanese national and that in so doing he violated a Japanese traffic regulation which appeared on a signboard but which he could not read. Being on a non-duty status, there would be no question but that under the agreements, if valid, Japanese jurisdiction would attach. The thought of having one of our officers, particularly one of high rank tried before a civilian tribunal of the foreign, former enemy nation, to which he is assigned, is rather absurd and degrading, to say the least.

Throughout the ages the army carried with it its own code of law when in the territory of a foreign sovereign. Now the United States submits its officers and enlisted men to the civil courts of a former enemy nation even though we are in that nation's territory by invitation and for the protection of that nation against aggression. Under our constitution and laws, it may not be done—at least not in the manner it was attempted here.

POINT VII

Appellee would not receive a "fair trial" in the Japanese Courts on standards generally recognized in the Courts of the United States (Federal and State).

Appellants' argument, advanced with great force in the District Court, that Appellee would receive a "fair trial" in a Japanese Court, begs the issue. Fairness is a relative term. Admittedly, constitutional safe-guards of substantive law, evidence and procedure, would not be available to Appellee in a Japanese Court.*

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* In an attempt to foreclose this Honorable Court from being informed as to the character of "justice" and the type of "fair trial" one receives under Japanese law, the Appellant made the gratuitous statement on page 57 of its brief, that the Appellee "disavowed in the District Court any contention that his trial by Japan would be unfair or unjust". This statement is incorrect. The subject was argued at length in the District Court by both sides. The United States Attorney referred the District Judge to all the basic guarantees of a "fair trial" which an accused enjoys. He told the Court "the President himself has stated that we can expect fair treatment at the hands of the Japanese Courts". Appellee's counsel argued the contrary and in the memorandum which was submitted pointed out that trial in a Japanese Court would not be fair under the law of "due process' as we know it.

The issue of "fair trial" is brought before this Honorable Court because it tends to show the extent to which the men in our Armed Forces are stripped of constitutional rights by the 'surrender of jurisdiction program' presently in vogue.

At Hearings held on April 7th and 8th, 1953, before the Senate Committee on Foreign Relations, it was demonstrated that the so-called benefits which an American soldier would receive by trial in a foreign court is about as beneficial as the "hangman's noose". It was admitted by the government witnesses that in certain countries a *secret trial* may be had; that *no jury* was required; that there was *no presumption of innocence*; that witnesses could not be compelled to testify, and that upon any evidence acceptable to the foreign court, an American soldier may be put to death or have such other punishment inflicted on him as the tribunal determined. In countries operating under the Napoleonic code, it is even worse because the presumption of guilt rule applies. Of course, the government officials are quick to say that no such thing *has* happened but they admit that under the "Administrative Agreement" involved in this case it can happen—in which event, of course, there is no redress.

The Secretary of Defense, Honorable Charles E. Wilson, one of the Appellants herein, when testifying before the Senate Committee on Foreign Relations on April 7, 1953, pointed to the several alleged basic rights which are guaranteed an American soldier before a Foreign Court—seeking to indicate that the equivalent of "constitutional safe-guards" and "due process" would be afforded He said the accused would be entitled to (1) a prompt and speedy trial. Senator Knowland's comment was very appropriate. He said "he would get that even in a Communist country." General Hickman's testimony, contained in the record of other Congressional Hearings, showed that a prompt and speedy trial is not always afforded (Appendix VIII). In a case which has come to light in this court (*Cozart* v. *Wilson, supra*), fifty weeks were required for the trial and a total of twenty-two court sessions. Pending trial in the *Cozart* case, the two petitioners were kept in jail for a period of fourteen months. These facts belie what Mr. Wilson said to the committee members about a prompt and speedy trial.

Mr. Wilson then pointed to other so-called rights of the Defendant: (2) "to be informed, in advance of trial, of the specific charge against him." This is the least that could be expected anywhere. In any event, it has been reported that in certain cases before the Japanese Court the charges were served just prior to the commencement of the trial; (3) that witnesses must confront the accused. How can this be beneficial to the accused when he does not know what is being said and there is no conformity to the rules of evidence, as we know them? (4) to have compulsory process *if* the witnesses are within the jurisdiction. But what if a major witness is one mile over the border? The taking of depositions, a very important right conferred by the Uniform Code of Military Justice, is not available to a soldier charged before a foreign court. In addition, under the Uniform Code, compulsory process is not limited to a specific area and witnesses may be transported from one country to another, if necessary. Further, this alleged basic right of compulsory process is meaningless because, even if you do compel the witness to appear in the court, under the law of certain foreign countries, he is not compelled to give any evidence. In some foreign courts, and we do not know whether this is true in Japanese Courts, witnesses do not appear. Information comes to the presiding judge in the form of a dossier prepared by the Magistrate. The procedure does not allow questioning or cross-examination except by the judge himself. Mr. Wilson, nevertheless, and other government officials, point with pride to all these procedures as satisfying "due process" and constitutional safe-guards.

Mr. Wilson, continuing, said, (5) there is the right to have legal representation of one's own choice. But what of a case like the present one where the Japanese lawyer, who was discharged by Girard, publicly stated that he may not be discharged and that in the event he were, the court would reappoint him. This is an example of the so-called

basic right to have legal representation "of one's own choice"; (6) the accused may have an interpreter "if he considers it necessary", and (7) the accused may communicate with a representative of his own government.

The above constitutes the "Bill of Rights" which the American soldier has when he finds himself in difficulty with the laws of a foreign nation to which he was sent by military order and these are the rights which the government says satisfy constitutional requisites of due process.

"But what about the right to trial by jury", asked Senator Knowland and "the right to the presumption of innocence", asked Senator Ferguson, "and the provisions for bail", asked Senator Langer, and we may add: What about the right to a public trial; to release on bail; rights against double jeopardy; against cruel and unusual punishment; to proof of guilt beyond reasonable doubt; to a preliminary showing of probable cause; to remain silent without adverse inference being drawn therefrom; to *habeas corpus;* to appellate review; to protection against *ex post facto* laws, unreasonable search and seizure, bill of attainder, excessive bail; the right to compel witnesses to appear *and* testify; to apply for Presidential Pardon and a host of others?

All the above mentioned rights, which "due process" and constitutional safeguards guarantee in a trial before an American court are stripped from the American soldier when he is tried before a foreign tribunal. These are not important said one of the "top lawyers", an assistant secretary for the Defense Department when he testified before the Senate Foreign Relations Committee on April 7, 1953. He said in his opinion all the requirements of "due process" are satisfied "if a man has a chance to prove his own case, to develop his own case and prove his own facts, that would be all that would be absolutely required in elemental justice and equity; Yes, sir," (Appendix III). Other witnesses who testified for the government indicated that they were equally lacking in knowledge as to what constitutes due

process under our constitutional form of government. Regardless of the manner in which it is twisted, the fact remains that a trial before a Japanese Court *is not* and *cannot* be the same as a trial before an American tribunal.*

Court Of Military Appeals in *United States* v. *Charles V. Burney*, 21 C. M. R. 98, 124 said:

> "It was the intent of founders of our Constitution to insure basic guarantees of due process to each citizen. * * * *The courts of foreign sovereigns, especially in civil law countries, are bound to follow traditions which are foreign to American standards of due process of law.* Far better it is for an American accused to be tried by American court-martial, where he is entitled to representation, liberal rules of evidence, a presumption of innocence, and thorough review, than to be brought before a French, or Japanese, or German, or Moroccan, or even English civil court. In addition, because we are a nation of civilian soldiers, sailors, and airmen, many of the persons who now serve as court-martial members are the selfsame individuals who previously served on grand and petit juries, and their views of justice do not change with their garb." (Italics supplied.)

In the concurring opinion of Chief Justice Quinn in the *Burney* case, the following appears at page 125:

> "At the outset, it is important to repeat what I said at the beginning of my dissenting opinion in

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* A United Press release under date June 16, 1957, Tokyo, publishes an interview with Mr. Raymond N. Bushell, an American lawyer admitted to practice before Japanese Courts. He is reported to have said: "Japanese justice is a joke," operated under "19th-Century procedures." Bushell said he has seen Japanese convicted in civil courts on evidence that would not even warrant indictment in the United States * * * that under outmoded procedures "Japanese lawyers continually advise their clients to plead guilty regardless of guilt or innocence and tell a 'sob' story to the judge in hope of getting a suspended sentence." He said that if the Japanese prosecutor tells the court a defendant is guilty, the judge is convinced the man is guilty * * * and that it is not necessarily a fact that if Girard went before a Japanese court he would receive a light sentence, "unless you consider 20 years a light sentence."

United States v. Sutton, 3 U. S. C. M. A. 220, 228, 11 C. M. R. 220: 'I have absolutely no doubt in my mind that accused persons in the military service of the Nation are entitled to the rights and privileges secured to all under the Constitution of the United States, unless excluded directly or by necessary implication, by the provisions of the Constitution itself.' Consequently, in my opinion, there is no merit to the argument that the Constitution has no application outside the continental limits of the United States. The cases cited in support of that argument deal with the general question of the territorial application of the Constitution. Hawaii v. Mankichi, 190 U. S. 197, 23 S. Ct. 787, 47 L. ed. 1016; Downes v. Bidwell, 182 U. S. 244, 21 S. Ct. 770, 45 L. ed. 1088; or with the practical inapplicability of specific provisions of the Constitution to "residents or temporary sojourners aboard." Ross v. McIntyre, 140 U. S. 453, 464, 11 S. Ct. 897, 35 L. ed. 581. *Our armed forces are now stationed in 63 foreign countries, as part of our program of national defense and our effort to preserve the peace of the world. They are not thereby deprived of their Constitutional rights and privileges. On the contrary, those Constitutional rights and privileges are a fundamental part of the military law. And the military law governs our armed forces whether they are within or without the continental limits of the United States.*" (Italics supplied.)

THE PRESENT POLICY OF THE UNITED STATES TO SURRENDER JURISDICTION IS LEGALLY UNTENABLE AND MORALLY WRONG: Aside from the illegality of the "executive agreements" designed to confer criminal jurisdiction on foreign tribunals to punish, to lodge in jail, or to execute American soldiers assigned to overseas duty, it is morally wrong to draft or accept as volunteers in the Armed Forces the youth of this nation, request them to lay down their lives if need be, to protect the Constitution and Government of the United States and at the same time strip them of every vestige of Constitutional right.

All the protestations and voluble talk emanating from the supporters of Status of Forces agreements cannot change the fact that the morale of the American troops all over the world has been seriously impaired. Of course, the lonely voice of the G.I. stationed in the desert of Arabia or on a frozen plateau in Iceland or at military bases in Formosa, Greece, Turkey, Japan or elsewhere is hardly a whisper to be heard anywhere. To be imprisoned in one of these places reduces his voice even further. He is disenfranchised.

What sympathetic or helping hand can the G.I. expect from the populace of a nation we only too recently conquered? Trial in our own courts would not give rise to this situation. The men in our armed services come from all walks of life. Some dull, others excelling in mentality; some brave, others meek; some have the ability of expression, others do not. When we judge our own people we are better able to take these various factors into account but note what a Japanese Judge takes into account when he imprisons an American soldier. He considers the fact that the accused, an American soldier, failed to comply with a Japanese custom of expressing sympathy (Appendix X).

In the Congressional Record, February 20, 1956, page A1552, appears the following: "Congressman Frank J. Becker, New York, visited American Servicemen imprisoned in foreign jails. He concluded that the protection of the United States Constitution has been taken away from these citizens serving us overseas by the Status of Forces Treaty. These are the GI's who had been tried and convicted in foreign courts and are now serving sentences in foreign prisons.

Those imprisoned in France and England were visited. All the GI's in England said that they would have preferred to be tried by Army or Air Force court martial. They felt that they would have had a much fairer trial

and would have preferred to have an American officer defend them, even if they would have received more severe penalties from United States authorities. This was the rule before the Status of Forces Treaty.

In France, a man is guilty until proven innocent; under our Constitution a man is presumed innocent and must be proven guilty. All but one GI would have preferred the court marital to prosecution in the French courts. Their trials were conducted in French; in two cases the French lawyers could not speak English." (Italics supplied.)

CONCLUSION

The order appealed from should be affirmed and upon affirmance modified to the extent of ordering release from custody forthwith.

Respectfully submitted,

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Counsel for Appellee.

Appendix I

Extract of letter dated July 15, 1955 from the former President of the American Bar Association, Hon. Frank E. Holman, to the Chairman of the House Foreign Affairs Committee, expressing opposition to the Status of Forces Agreements.

• • • Marshall then went on to say no sovereign whose troops are in the territory of a friendly foreign state could afford to surrender exclusive control over those forces.

In *Coleman* v. *Tennessee* (1878) (97 U. S. 509, 515), Marshall's doctrine, widely accepted throughout the civilized world until the Status of Forces Treaty, was briefly summarized as follows:

> "It is well settled that a foreign army, permitted to march through a friendly nation, or stationed within it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place."

To the same effect is *Dow* v. *Johnson* (1879) (100 U. S. 158, 165).

In fact, at the time the Status of Forces Treaty was approved by the Senate, the Army Manual provided that our own Armed Forces retained exclusive jurisdiction over our soldiers located without the country. In other words, after the representation had been made to each American soldier ordered abroad that he could only be subjected to American military courts, a treaty was made and ratified which destroyed the legal protection which was in force when he left the country.

It will not do to say that this fundamental principle of international law only applies in time of actual occupation of a country during the progress of a war. This distinction was never made until it was first advanced by the Senate Foreign Relations Committee in connection with the Status of Forces Treaty. Of course the situation is and always has been very different where nationals of one country, even soldiers, are in a foreign country casually or for some personal or business reason.

The fact is that the Status of Forces Treaty was contrived by the State Department with the hope that it would help secure ratification, particularly by France, of EDC.

The State Department had already, with a view to placating French sensibilities, entered into a secret executive agreement with France along the lines of the Status of Forces Treaty and, to confirm this secret arrangement and put other countries on the same basis, the Foreign Relations Committee of the Senate recommended that the secret agreement be formalized by treaty. Senator Knowland, the majority leader in the Senate, in the debate on the Status of Forces Treaty admitted that if the matter were before the Senate as an original proposition, no such arrangement would be acceptable to him.

There is nothing in the record of the hearings before the Foreign Relations Committee or in the Senate debate, or elsewhere, that indicates that any of the countries involved either denied the traditional principle of international law above referred to, or undertook to impose as a condition of our troops being on their soil the right to try them in the local courts. The whole matter was a sheer gesture of appeasement on the part of the State Department, and, as in most cases of appeasement, the appeasement accomplished nothing. In spite of the Status of Forces Treaty, France did not ratify EDC. We not only let the nations that are friendly try our military personnel and lodge them in foreign jails, but we have adopted the same folly of appeasement with respect to our American GI's who are now lodged in Chinese jails.

It is no comfort to the wives and mothers of America and to our soldiers compelled to serve in foreign lands to be told that the Constitution does not follow the flag, even though the idea is dressed up in some such phraseology as that "The Constitution cannot limit the operation of foreign courts within the territory of a foreign nation." This is not the point of the matter. There is no question of limiting the operation of foreign courts. The point is, surrendering by treaty the right of an American GI to be tried as the Constitution itself provides in accordance with rules and regulations established by the Congress of the United States, and in accordance with the traditional and established rule of international law, as it existed before changed by a treaty of appeasement (italics supplied).

Appendix II

A series of questions by United States Senators and answers given by Government Officials who appeared in support of the NATO, Status of Forces Agreement at the Hearings held April 7 and 8, 1953, before the Senate Committee on Foreign Relations.

Senator Green: Is there any special reason why they are brought up now for ratification?

Secretary Wilson: Well, they cannot be put into effect by the United States until you gentlemen ratify them; that is the reason they are here. p. 13

Senator Knowland: Is it the judgment of the Defense Department and yourself, as Secretary of Defense, that this format of an agreement is going to be a precedent * * *

Secretary Wilson: That is very likely; it is not necessarily so, but it is probably so. p. 15

Senator Knowland: * * * Where we are drafting and sending abroad large numbers of Americans—both the military forces and their dependents—do we not have an additional obligation to see that whatever legal processes they are finally brought under they are in keeping with American standards of justice?

Secretary Wilson: I think that is pretty well taken care of by the agreements, too * * * p. 16

Senator Langer: * * * I do not see any provision whereby our men in foreign countries would have any right to trial by jury?

Mr. Haydock: * * * most of the continental countries * * * have a civil law system which is based on the early Roman law, and they have a somewhat different procedure. They do not recognize a trial by jury * * * p. 18

Senator Knowland: • • • since this is being done as much for their protection as for ours, and since we are laying out vast sums of money and sending large bodies of troops abroad, as well as arms, it seems to me we should be in a position to get a reasonable *quid pro quo* for our people • • •

Secretary Wilson: • • • I was not worried about the countries which have the same common-law background as we. You are referring however to the chance that under two different systems there may be some miscarriage of justice • • • through the years it has developed that the emphasis in our system on presumption of innocence is largely an emphasis on words • • •

Senator Ferguson: I am compelled to disagree with that. I think the presumption of innocence is one of the very fundamentals in America, and it is well understood by juries and by lay people. pp. 21, 22

Secretary Wilson: • • • I realize that you men are discussing fundamental things, because we do not follow their courts and methods of justice up to a point, although with certain reservations.

Senator Ferguson: I think that is the whole point. p. 22

General Smith: Senator Knowland asked • • • What is the basic difference between • • • these agreements and that which we had in World War II? In World War II • • • we had complete extraterritoriality • • • p. 23

Senator Wiley: In what respects, then, if any, will the agreements change the status of the United States Forces?

Mr. Yingling: They will not change them substantially • • • except in the direction of bettering them. pp. 23, 24

Mr. Phleger: * * * Under this proposed agreement the United States military authorities will have exclusive jurisdiction * * * for offenses arising out of any act or omission done in the performance of official duty. * * * That leaves as the only area in which the foreign country will have jurisdiction criminally an offense committed by a member of our force when he is not engaged in official duty. * * * p. 25

Senator Ferguson: I am interested in the point that Mr. Phleger made with respect to our exclusive jurisdiction on military reservations.

Mr. Phleger: That is not right. If he is on an Army post, engaged on duty, we have exclusive jurisdiction. We do not have territorial jurisdiction, as such.

Senator Ferguson: Would it not be hard to conceive that the commission of a crime would be in line of duty?

Mr. Yingling: Well, it might be in the course of the performance of official duty. p. 27 * * * a man, for instance, who is a guard on a post may shoot somebody. p. 28

Senator Ferguson: Yes; I can see how that would happen.

Mr. Yingling: Then the question would come up whether he used excessive force; therefore whether he committed an offense. In that type of case we would have jurisdiction. p. 28

Senator Smith: I do not know of any case where we have yielded jurisdiction over our boys abroad to foreign criminal codes, to foreign penalties, to foreign courts.

As I understand it, when we are occupying a foreign country under military conditions, we maintain extraterritoriality, and we take care of our own cases. We do not submit our boys to the jurisdiction of other courts.

I know when we were discussing the Japanese Security Treaty * * * inasmuch as the Japanese criminal code is very different from our Anglo-Saxon one. It seems to me that there is a conflict of jurisdiction involved which is very difficult to resolve.

General Smith: * * * You are quite correct, when you occupy a country under military conditions, that is, as a conqueror or as a liberator, you impose your own extra-territoriality * * * p. 30

Senator Smith: Then apparently there is a conflict between the old Roman law versus the Napoleon Code and the Anglo-Saxon.

Mr. Phleger: That is true * * *

Senator Smith: I am not sure that a jury trial there would mean as much as it would mean here. It would not be a jury of peers; it might even be a jury of hostile population. You are * * * accepting the criminal codes of the 14 countries now in NATO, and agreeing to abide by their definition and their penalties for crimes, as well as by their trial procedures afforded in criminal cases.

Mr. Phleger: Only in a case where the member * * * is not acting in the performance of his duty.

Senator Smith: I understand that. pp. 31, 32

Senator Ferguson: What do you mean the presumption of innocence prevails?

Mr. Phleger: It does in the sense that we use the presumption of innocence * * * they do not apply the rule of evaluating the evidence, as we do, that it must be beyond a reasonable doubt.

Senator Ferguson: Which is a great difference.

Mr. Phleger: Well, we Anglo-Saxons believe it is * * * p. 44.

Senator Knowland: * * * I merely respectfully suggest that perhaps before the NATO agreements were entered into, we should have taken the position that for valid reasons—and I think there are very valid reasons—when we send Americans and their dependents overseas, they are

to be under the jurisdiction of our forces. No one would be forced to take them, but * * * they would go under these conditions * * * pp. 46-47

Senator Ferguson: That means he can have double jeopardy?

Mr. Phleger: It does if our military forces believe that the offense * * * has not been adequately punished by the civilian authorities * * * p. 48

Senator George: [Is] * * * a member of the armed forces * * * accorded the same rights and privileges, and is [he] tried under the same procedure that any citizen of the receiving state * * * would be entiled to have? * * *

Mr. Phleger: * * * that is the agreement. p. 49

Senator Knowland: * * * I do not believe that the record should stand here that Americans serving abroad should be subjected to * * * penalties * * * which would not necessarily apply to our system of justice. p. 50

Senator Ferguson: Then it does not provide for an open trial * * *

Mr. Phleger: These provisions do not require an open trial * * *

Senator Ferguson: * * * there can be secret hearings * * *

Mr. Phleger: There is a provision * * * that * * * a representative of the United States Government shall be present, where the rules of the Court permit.

Senator Ferguson: * * * that would still prohibit * * * an open trial, if the law provided for it.

Mr. Phleger: That is true * * * p. 55

Senator Ferguson: * * * these agreements do not provide for right of review in the United States?

Mr. Phleger: Not of the United States, no.

Senator Ferguson: Do you think there is a difference between citizens voluntarily [going] * * * to a foreign country * * * and men * * * drafted * * * and sent * * * to a foreign land?

Mr. Phleger: I do not see the distinction * * * pp. 55, 56

Senator Ferguson: Our Constitution prohibits cruel and unusual punishment, but I notice in these agreements nothing is said about type of punishment.

Mr. Phleger: Well, I do not think you expect a sovereign to yield up his right to determine what the punishment for offenses is * * * p. 59

Senator Hickenlooper: * * * By what authority can we execute agreements which affect the life and liberty of our troops?

Mr. Phleger: Senator, if we send our military forces abroad without any agreement they automatically become subject to the jurisdiction of the receiving state * * *

Senator Hickenlooper: Under what authority do our representatives * * * engage in negotiations? Does that authority stem from our civil or military law, or does it come from some other source?

Mr. Phleger: Well, that authority extends * * * from the authority of the military command * * *

Senator Hickenlooper: * * * I am still not clear on the source of the authority.

Mr. Phleger: That comes from a provision of the Constitution that the Chief Executive shall execute the laws of the United States and shall perform the functions and duties of the Commander in Chief, and it is delegated down then to all subordinate officers.

Senator Hickenlooper: * * * I do not know that I can agree that it comes from the Commander in Chief's authority. Where is the dividing line between the exclusive jurisdiction of the military and the exclusive jurisdiction of the civilian? * * *

Mr. Phleger: Senator, the basic law is an act of Congress which established the Uniform Code of Military Justice * * * p. 67

General Smith: When our forces go abroad they carry with them the Uniform Code of Military Justice, an act of Congress, and it applies to the Armed Forces regardless of where it is in the world, because it accompanies them. Insofar as the arrangements with the local authorities are concerned * * * whatever arrangements they make are made under the presumable authority of the President in his capacity as Commander in Chief * * * is that not correct? It has never been very clearly defined. p. 68

Mr. Yingling: The status of the American soldier is determined by American law * * *

Senator Ferguson: It would appear, then that this particular agreement does change his status * * *

Mr. Yingling: No. By entering into the treaty we change our law * * *

Senator Ferguson: Then we do by this agreement change the law of a State.

Mr. Yingling: I think so, yes.

Mr. Phleger: Yes.

Senator Ferguson: Then we had better be careful what we are doing. p. 74

Appendix III

Extracts from testimony given by Secretary of Defense, Charles E. Wilson and Assistant Secretary of Defense, Frank Nash at Hearings held before the Senate Foreign Relations Committee, on April 7, 1953.

Senator Ferguson: Mr. Secretary, what about countries where there is no presumption of innocence; where, for instance the presumption of innocence does not apply as it does in America. In other words, a man has to prove himself innocent instead of the state proving him guilty. Mr. Nash, what is our position there?

Mr. Nash: I was about to say at the point of your question, Senator, that these various guarantees that are listed here, as Mr. Wilson just read them to you, add up to just about what this man would get if he were being tried in a military court.

Senator Ferguson: Show us where the presumption of innocence is among these, please. I did not hear it.

Mr. Nash: It is not listed there.

Senator Ferguson: Is that not very vital? Is that not the vital point of the difference between a trial here and in some of these other countries? I did not notice that presumption here.

Mr. Nash: It is not there, Senator.

Senator Ferguson: Why not? Is that not one of our safeguards in America? Is that not really the fundamental of them all?

Presumption of Innocence and Due Process

Mr. Nash: I am not an authority on constitutional law, Senator, and I would hesitate to get into any discussion of it, but I do not think it is one of those fundamentals of due process—

Senator Ferguson: Are you familiar with criminal law?

Mr. Nash: That you would have to have in order to have a fair trial.

Senator Ferguson: Do you consider that presumption of innocence does not enter into due process?

Mr. Nash: I think that if a man has a chance to prove his own case, to develop his own case and prove his own facts, that that would be all that would be absolutely required in elemental justice and equity; yes, sir.

Senator Ferguson: Do you consider that due process in America implies a presumption of guilt whereby a man has to prove himself innocent?

Mr. Nash: I think with American traditions, we would never adopt such a thing, but we have to look at the systems of these other countries.

Senator Ferguson: But we were considering the possible case of a man sent abroad under draft who must stand trial bound by a rule that he is not presumed to be innocent. This would violate the very fundamentals of American criminal justice. Do you think that is right?

STATUS AGREEMENT WITH FRANCE

Mr. Nash: Senator, the best way to answer the question, as I see it, is to say this: In France, where we have had troops for the last 3 years, we have had a status agreement—I cannot go into the details because it is a classified document, but it adds up to this—

Senator Knowland: Why can't this committee have a copy of that agreement? We are asked under our constitutional responsibility to ratify these agreements, and I think we are entitled to have such information.

Mr. Haydock: The information has been supplied to the committee, Senator.

Mr. Nash: If I could complete the sentence, Senator, for 3 years the troops that we have had in France—and there have been quite a large number—under the current agreement with France, we have had less rights for our troops than we would acquire under this NATO treaty; we also have had less under our agreement with Italy.

I just want to make the comment that we have gotten along quite well under their system, although it is different from ours, and, of course, no American would think it as good as ours.

PRESUMPTION OF GUILT—FUNDAMENTAL DIFFERENCE

Senator Knowland: That does not impress me greatly, because we may have been very derelict in entering into that kind of an agreement, particularly if we had so little protection heretofore that this is an improvement. I think the basic point that Senator Ferguson raised is the fact, that if Americans or their civilian dependents are placed under laws of foreign countries, where the presumption of innocence does not apply but the presumption of guilt does apply, it is a very basic change in what we have asked Americans to do.

Now, this is entirely different, in my judgment, from an individual American who is traveling in a foreign country at his own initiative. Here we are taking large numbers of American citizens by draft or volunteers, as the case may be, who recognize the danger of international communism, and transferring them in practically whole communities abroad. Under those circumstances we are subjecting them to an entirely different legal system where they are presumed to be guilty rather than innocent. I think we have made a very basic change in the protection we afford our nationals.

Secretary Wilson: Senator, you put your finger on a very important matter, of course. The difficulty is that we cannot force these partners of ours to accept our system completely.

QUID PRO QUO

Senator Knowland: No, sir; but since this is being done as much for their protection as ours, and since we are laying out vast sums of money and sending large bodies

of troops abroad, as well as arms, then it seems to me we should be in a position to get a reasonable quid pro quo for our people.

I hope you realize that this is not directed at you, because I understand that this agreement was negotiated long before you came into the Defense Department. On the other hand, you are now coming before us and asking us to ratify this, and we are entitled, as I think you understand, to ask some rather searching questions.

Secretary Wilson: I asked the same questions. I was not worried about the countries which have the same common-law background as we. You are referring, however, to the chance that under two different systems there may be some miscarriage of justice.

Presumption of Innocence Versus Guilt

Mr. Nash has been pointing out that even under the civil-law system, justice has generally been properly developed and, perhaps, through the years it has developed that the emphasis in our system on presumption of innocence is largely an emphasis on words, and that what actually happens in court—

Senator Ferguson: I am compelled to disagree with that. I think that the presumption of innocence is one of the very fundamentals in America, and it is well understood by juries and lay people.

Secretary Wilson: I understand the great difference, but we do not seem to have had cases where innocent people have been proved guilty in France because they could not prove their innocence. We do not seem to have tangled with that one. (pp. 19-22)

* * *

Appendix IV

Resolution of the American Legion in opposition to the Status of Forces Agreements adopted by its National Executive Committee at its May 4/6, 1955, meeting in Indianapolis. The Resolution appears in the Report of the Hearings held before the House Foreign Affairs Committee in July 1955.

"The Senate of the United States on July 15, 1953, ratified a treaty agreement between the countries comprising the North Atlantic Treaty Organization whereby members of the Armed Forces of the United States stationed in any of the treaty countries should be subjected to trial by the courts of those countries for any criminal offenses alleged to have been committed by them in these countries and, where so provided, to serve sentence in prisons of such countries.

The peace treaty with Japan, as ratified by the Senate on September 29, 1953, included a similar provision concerning members of our Armed Forces in Japan.

The concepts of freedom and liberty for the individual human being in some of these foreign countries differ basically with our American ideas in that here in the United States a person is considered innocent until proven guilty.

The prisons in many of these foreign countries are nothing more than mere dungeons and prisoners are subject to neglectful if not outright cruel and inhuman treatment.

It is evident that many nationals of some of these foreign countries are apparently prejudiced against Americans generally and specifically against those who are serving as members of the Armed Forces of the United States and stationed in those countries.

The American Legion solemnly and energetically urges that the treaties mentioned in this resolution and all similar treaties be modified to the extent that any and all members of the Armed Forces of the United States stationed in foreign countries and charged with crimes of whatever nature, committed in these countries may be subjected to trial only by the military tribunals of the Armed Forces of the United States and, upon conviction, be meted out punishment by such military tribunals in accordance with the principles and procedures guaranteed by the Constitution of the United States." (Italics supplied.)

Appendix V

Extracts from statement made on June 22, 1957, by Congressman Frank T. Bow of Ohio, concerning the illegality of Status of Forces agreements and the injustices resulting from their operation.

"* * * The administrative Agreement with Japan, the amendment thereto, and all the other status agreements, are so-called executive agreements, which the administration has given the same force and effect as a treaty. We now have agreements with 54 countries and perhaps others which are classified. Most of them include a provision which confers exclusive criminal jurisdiction over our servicemen to the foreign countries in which they may be serving—at least for alleged offenses when off duty.

There are a number of reasons why these agreements are wrong. I have repeatedly pointed out that they automatically deprive any serviceman of rights granted him by the Constitution of the United States as soon as he is surrendered to a foreign authority for trial. He is thrown into a Constitutional vacuum—for all practical purposes he is no longer a United States citizen—from the time the foreign criminal proceedings are started, until his trial is concluded. After he has paid his penalty, if convicted, the military will reclaim him for the purpose usually of giving him an undesirable discharge, based on his conviction by foreign justice * * *.

The studies of foreign laws, made by the Defense Department at the direction of the Senate, shows these are the rights he is most certain to lose: 1. The right to a prompt and speedy trial. 2. The right to be presumed innocent until proven guilty. 3. The burden of proof on the government to prove such guilt beyond a reasonable doubt. 4. The right not to be compelled to testify against himself. 5. The right not to have involuntary confessions used against him. 6. The right to cross-examine the witnesses against him, which follows from the right to be confronted by such witnesses.

The NATO Status of Forces Agreement and the Amendment to the Administrative Agreement contain provisions which are supposed to protect the rights of an accused. Some persons mistake these for a recitation of Constitutional rights. The joint statement issued by the Secretary of State and the Secretary of Defense, on June 4th, in the Girard matter, makes quite a point of reciting the protections contained in the agreement. You will not find any one of the Constitutional rights I have mentioned included in the rights recited in the joint statement.

No accused in Japan—in France—in Italy—in any foreign country—has such rights. There are other rights guaranteed by our Constitution which an accused may lose, depending to some degree on the country concerned, or the practical application of the laws by the court. These additional rights are: 1. A right to bail. 2. The right to be tried by a fair and impartial court. 3. The right to have a reasonable time to prepare his defense, after being informed of the charges against him. 4. The right to be present at his trial. 5. Protection against double jeopardy. 6. Protection against ex post facto laws. 7. Protection against bills of attainder * * *.

Under its Constitutional power Congress enacted a Uniform Code of Military Justice, providing a uniform code of procedure for the trial of military personnel, wherever they may be serving. The NATO Status of Forces Agreement as a treaty, and the other agreements without treaty standing, have substituted for the uniform procedure provided by Congress as many different systems of criminal laws and procedures as there are agreements. We, therefore, have two classes of servicemen and penalize the man who serves abroad for his service. The idea has been advanced that a man in military service lost his Constitutional rights when he entered military service. It is true that they may be slightly abbreviated by the Constitution itself, but that is no excuse for wiping them out completely by these status of forces agreements. In the Uniform Code

of Military Justice, Congress has carefully spelled out most of the rights which I have enumerated—so that all servicemen shall be treated alike.

The status agreements also contravene a rule of International Law of long standing—that the armed forces of a country stationed by consent in another country are not subject to the laws of the visiting nation. This is a legal proposition which can be supported by authorities going back to biblical days * * *.

It is obvious that our armed forces are no longer a symbol of the dignity of the United States. We "lost face" when we surrendered jurisdiction over our soldiers to Japan * * *

There is every indication now that our representatives who engineered this arrangement with Japan were somewhat inept, although the official admission has been slow in coming from any Executive Department. The General Counsel, Department of Defense, appearing before a subcommittee of the Senate Armed Services Committee on June 5, 1957, admitted that the official minutes agreed upon by our representatives at the same time as the protocol amending the Administrative Agreement, really gave a Japanese court the right to say when an American serviceman is on duty. The real facts have, therefore, never been given the American people.

For several years representatives of the State Department and the Defense Department have been proclaiming our right to try our servicemen for offenses on duty. They were covering up the fact that Japan put something over on them—that the agreement really was that we have exclusive jurisdiction of our servicemen for acts and omissions while on duty—only after a Japanese judge has determined he was on duty.

We are all familiar, now, with other reasons given by defenders of the Status of Forces Agreements to justify their continuance. Some of these have become almost hoary cliches. It is as if a repetition of them will make them true * * *

Possibly the most ridiculous defense made for the NATO Status of Forces Agreement is that it is reciprocal. Tied in to this is the assertion that we want to try foreign servicemen on duty here, and therefore, must give up jurisdiction over our troops abroad. We have over a million men serving abroad. The best estimate obtainable from the Defense Department is that not more than three or four thousand foreign servicemen, from all the nations combined, are in this country at any one time * * *

The claim that we want to try foreign servicemen in our courts is accompanied by the bogey of murder, rape, arson or some other very serious offenses by mobs of servicemen * * * When we have large numbers of foreign troops in our country, it will not be to defend us. They will be warring on us * * *

It is scarcely necessary to repeat the facts concerning the incident involving Girard in Japan, even though the facts have been garbled and changed from time to time to meet the needs of explanations by the Executive Departments. The truth stands out clearly—Girard was on duty when the incident occurred. The Commanding Officer of Girard's division certified this under the agreement. The government conceded the fact in the court proceeding. If he exceeded his instructions in any way while on duty, he is subject to courtmartial by our military authorities. I am ashamed of the means so far employed by both the Defense and the State Departments to attain their ends in this case * * *

There is no question but that a mistake was made in the first instance by someone in the Defense Department in instructing Admiral Hubbard to announce his decision to surrender Girard to Japanese justice. What followed is a new low in American fair play and justice. We have a joint statement issued by the two Secretaries on June 4, in which they try and convict Girard without a hearing—in order to justify their decision again, to turn him over to the Japanese. All that is missing from their condemnation is the exact crime of which he is convicted. This is then

followed by news leaks emanating from officials of the Defense Department and others, all calculated to smear Girard and to condition the American people to the acceptance of the foreign trial as being Girard's due. Finally, we have the Secretary of State filing in a court of justice his affidavit seeking to influence the court in its decision. He was not only trying to speed up the course of justice, he was actually trying to frighten the court with the dire consequences of rendering a decision contrary to what the "powers that be" demanded. This was an uncalled for and unprecedented action—done solely for the purpose of exerting all pressure possible on a Judge of the United States District Court.

Earlier, in the same case, the Secretary had filed an affidavit made the same day as the one filed later, in which he asked to be excused from responding to a subpoena on the ground that he had no personal knowledge of the case. Such conduct is deplorable and sickening to anyone who has regard for our system of jurisprudence. Perhaps the Secretary would like everyone to forget, too, that the only reason we have had this so-called international incident is because our diplomats were too incompetent to negotiate agreements with other nations that would preserve the rights of the United States and its citizens. Our diplomacy has reached a sad state when it must base all of its decisions on the whims of agitators and demonstrators of other nations.

One sop handed to the American people, in the Joint Statement of the Secretaries, was that Girard would receive a fair trial, and if he did not—then they would take it up diplomatically. Since the diplomats have been powerless so far—what could we expect of them later? The issue has never been whether he will receive a fair Japanese trial—it is whether the Japanese should try him at all. I have already told you what constitutional rights any accused serviceman can lose in a foreign court. It follows, I think, that no American citizen will have a fair trial in any foreign court where he is deprived of these rights.

The persons who prepared the joint statement, and have since been putting out praise of Japanese justice, should read some of the reports of the official observers of trials in Japan. These reports have shown the complete failure of interpreters in translating English to Japanese or vice versa; proceedings dragging out over weeks or months, copies of charges not furnished to the accused until the opening day of trial; changes or substitutions of judges during trial; convictions on written statements of witnesses taken before trial without cross-examination, and other items not countenanced in our jurisprudence.

The observers in one case said that the three accused servicemen had not received a fair trial and stood unjustly convicted. They further said the testimony offered was not only preposterous and fantastic, but in some respects patently impossible. This was the case in which General Hickman told the Senate Armed Services Committee in February 1956, appeal even to the highest jurisdiction in Japan had not cured the original defects in the trial amounting to a denial of justice.

Our diplomats didn't work a cure either. In view of these various reports—it is a false and studied misrepresentation for the Executive Departments to be lauding Japanese justice in their public pronouncements. Girard has been getting the headlines recently, but other Americans have suffered without benefit of the sympathy of Americans. For several years Japan has had in her prisons two-thirds of the total number of American servicemen serving prison sentences worldwide.

On October 31, 1956, the Headquarters of Far East Air Forces found it necessary to issue a warning to all personnel in Japan, as to the practice of bringing criminal indictments against United States personnel for injuries to Japanese nationals arising out of motor accidents. I have a copy of that warning. It states that the purpose of the letter was to keep airmen from joining the ranks of United States personnel then in jail. It strongly advised calling on the victim or his family to expresse sympathy and de-

liver flowers or fruit. Courts take this into consideration, and if it is not done, impose greater penalties.

Our servicemen in other countries have been subjected to about the same perils of justice as those in Japan. Most of the NATO countries have a system of laws based on the civil law and procedures are much the same * * *.

A French expert has said: "The code exists to protect society from the criminal, not to protect the criminal from judicial error. We run our courts to convict the guilty, not to acquit the innocent."

Yet there are some who will still argue that there is a presumption of innocence of the accused in foreign courts!

The practice of combining a civil claim for damages with a criminal prosecution is common in many countries. This gives the prosecuting witness a financial stake in securing a conviction. It results in more criminal charges being made in order to support the civil claim. The French have had such trials—after waiving jurisdiction to the United States—because a civilian came forward and wanted to press his claim. It has disturbed the morale of our troops, according to the American Commander in France.

Appeals are perilous in foreign countries because the procedure amounts to double jeopardy. The Court has the right to increase the sentence. Appeals are taken by the prosecution for the sole purpose of accomplishing this —and, some courts consider an appeal by the prosecutor to be a mandate for such an increase.

Now, just a word about the statistics kept by the Defense Department and the conclusions that are drawn as to the large percentage of waivers obtained from foreign countries. One very important statistic is not available. That is—how many of these servicemen, who were presumably charged by foreign authorities who subsequently waived jurisdiction, were actually tried by American court-martial? Until there is more information, I think we should assume that we do not have so many criminals in

the ranks of our armed forces, and that most of these statistics have been built up on inconsequential or fraudulent charges. Furthermore, waivers are not so readily given when a foreign country sees an opportunity to prosecute a serviceman for anything serious or remunerative.

The Defense Department spends considerable time in trying to make the picture look good. When the American Legion Magazine published the story of two servicemen who had been imprisoned in Japan, the Department immediately staged an investigation to discredit the article. The report of this investigation— of conditions they should have known without such proceeding—was a combination of corroboration, misrepresentation and plain falsehood * * *.

When hearings were held by the House Foreign Affairs Committee on my resolution offered in the last Congress, many efforts were made to fix the responsibility. Executive Department witnesses pretty well evaded the issue. Mr. Murphy, speaking for the State Department, remembered principally the emotionalism in France and Japan.

I am afraid this sensitivity to criticism, as expressed in staged demonstrations, is going to bring another sacrifice on the altar of diplomacy. The Formosa incident revealed that negotiations were pending with the Chinese Nationalist Government for a status of forces agreement. When I asked Secretary of State Dulles, by letter, if it was proposed to surrender to the Chinese Nationalists the criminal jurisdiction we now have over our forces, I received the reply which I have here.

There is a prime example of diplomatic deception—the use of the word "favorable" in the last sentence. Why didn't he say: "it is our purpose to obtain jurisdictional provisions as 'unfavorable' to the United States as those contained in the agreements we have already concluded with our principal allies throughout the world?"

We know that is what we are going to get if our diplomats have their way which is to continue to ignore the definite command of the Senate to not use the NATO Agree-

ment as a precedent. There is nothing favorable about any agreement we have today that surrenders jurisdiction over our troops to other nations. No amount of diplomatic jargon will make them so * * *.

Unfortunately, a feeling of resignation has developed among some who are acquainted with these agreements—possibly because the proponents of the agreements have adopted a fright argument—that any attempt to secure a modification of them will destroy our foreign relations—that we will be forced to give up our program of world security and withdraw our troops from foreign lands. It is also said that this means abandoning the world to the Kremlin. So anyone who favors my resolution is assumed to be in league with the communists.

Admittedly, it is more difficult to reclaim a right you have thrown away than it is to retain it against efforts to take it from you.

But there is no reason to say it cannot be done, when no one has made the effort. And no reason to continue to give away our rights because we are bent on demeaning ourselves further in the world.

Consider Formosa. The Chinese Nationalists are practically our wards. Without our continued support the government could not exist. We know full well the animosity that exists on that island against us. It was well demonstrated in the rioting and destruction of our property. Should we now reward that government by giving them jurisdiction of any kind over our troops? Should our servicemen be exposed to the obvious peril of prosecution in their courts? That is what the State Department is about to do.

I think it is high time we find out who our friends really are in the world. If any nation is so doubtful of our integrity and ability to try and to punish our men for wrongdoing, and so unfriendly as to refuse us this right—then I question their friendliness and whether they will support us in a pinch. We should not submit our servicemen to

trials in their courts because of this unfriendliness and animosity. We have no guaranty that if the time should ever come when we would really need the base or facility we are using, that it will not then be snatched away from us by an unfriendly nation. We may only be building up installations and equipment around the world for the future use of our enemies * * *.

Less than two weeks ago I was one of a group of Congressmen who were privileged to have breakfast with the President. I recall that he said it was necessary that all Republicans support and carry out the aims and purposes expressed in the Republican platform, adopted at the Convention at San Francisco. He further said that he would back any member who was backing that platform. Let me quote you one of the promises in that platform:

> "We maintain that no treaty or international agreement can deprive any of our citizens of constitutional rights. We shall see to it that no treaty or agreement with other countries attempts to deprive our citizens of the rights guaranteed them by the federal Constitution."

Appendix VI

Statement of Senator John W. Bricker made on the Floor of the United States Senate re the NATO Status of Forces Treaty. This statement also appears in the Report of a Supplementary Hearing held before the Senate Foreign Affairs Committee, on July 24, 1953.

The NATO Status of Forces Treaty would subject members of the United States armed forces to trial in the courts of NATO countries for nonmilitary offenses committed within those countries. As the Under Secretary of State, Gen. Walter Bedell Smith, conceded at the hearings (Record of Hearings, p. 53), the proposal is "unprecedented." Believing that this unprecedented agreement reflects a callous disregard of the rights of American armed forces personnel, I shall propose the following reservation:

> "The military authorities of the United States as a sending State shall have exclusive jurisdiction over the members of its force or civilian component and their dependents with respect to all offenses committed within the territory of the receiving state and the United States as a receiving state shall, at the request of a sending state, waive any jurisdiction which it might possess over the members of a force or civilian component of a sending State and their dependents with respect to all offenses committed within the territory of the United States."

The proposed reservation affects only the criminal jurisdiction in article VII of the Status of Forces Treaty. In my judgment, the other provisions of that treaty should be approved.

• • •

At the outset, I wish to make one fact absolutely clear. Nothing in the proposed constitutional amendment sponsored by 63 other Senators and myself would prevent the United States from becoming a party to a treaty like the NATO Status of Forces Treaty.

• • •

To approve the criminal jurisdiction provisions of this treaty would amount to penalizing the American soldier in an effort to please our NATO allies. Of course, I attribute no such motive to the President, to the Secretary of State, or to any member of the Senate Foreign Relations Committee. Nevertheless, that is the effect of the treaty before us.

Moreover, I do not criticize any member of the Foreign Relations Committee for not exercising due care and diligence in reporting this treaty favorable to the Senate. In the light of statements made by Government witnesses at the hearings, the committee's action was sound and logical. Unfortunately, the committee's action was based on false and misleading representations. As to whether the misrepresentations were deliberate or grounded in stupidity, I express no opinion.

The Fundamental Fallacy

The crux of the matter is what rights can properly be claimed for American servicemen abroad under generally accepted rules of international law. The Senate Foreign Relations Committee was informed by the Legal Adviser of the State Department, Herman Phleger, as follows:

> "Now with respect to the statement * * * that as a sovereign Nation we are now subject to the sovereignty of any country in which our troops are located, I do not view that as a correct statement of the law * * *."
>
> * * *
>
> "Individuals wearing our uniform and part of our military force do not have sovereign immunity, and there is no doctrine which says that a nation which has on its soil representatives of a foreign nation must give immunity to those persons. Immunity is restricted to those which the receiving nation chooses in the handling of its diplomatic affairs to give immunity to, such as Ambassadors, and so forth." (Record of hearings, p. 49.)

Believing this to be an accurate statement of international law, the Senate Foreign Relations Committee might reasonably have concluded that the Status of Forces Treaty was the best bargain that could have been made under the circumstances. Mr. Phleger, however, was dead wrong. His statement to the committee reveals his total lack of experience in the field of international law.

The rule of international law as laid down by Chief Justice John Marshall and many other later authorities is that troops of a friendly nation stationed within the territory of another are not subject to the local laws of the other country, but are subject only to their own country's laws and regulations for the government of the armed services.

The Specious States Rights Argument

To shore up his case for the criminal jurisdiction provisions of the treaty, Mr. Phleger resorted to a specious States rights argument. For example, he advised the committee:

> "Now, when these (treaties) were under consideration the question was, Will the United States surrender its sovereignty? Will the United States agree that if a French soldier goes into the city of Richmond and gets drunk and kills a citizen of Virginia that the court-martial proceeding shall be the exclusive remedy before a French court-martial? We could not conceive the negotiators, that this Senate or the United States would ratify any such treaty * * *" (record of hearings, p. 56).

The Senate Foreign Relations Committee appears to have accepted Mr. Phleger's States rights argument. For example, reference is made on page 15 of the report to the undesirability of "depriving" State courts of jurisdiction except in certain cases. Here, again, Mr. Phleger was 100 percent wrong. When armed forces of foreign countries are invited to come to the United States, it is not a question

of depriving the States of jurisdiction over their non-military offenses. The States have no such jurisdiction unless it be conferred by the United States with the consent of the foreign power.

A Strange Quid Pro Quo

Perhaps the most fantastic argument advanced by Mr. Phleger is that the criminal jurisdiction provisions of the treaty constitute a good bargain. This is Mr. Phleger's statement before the Senate Foreign Relations Committee:

> "I have no doubt when these negotiators sat down, the objective which the United States negotiators had was to get the maximum of jurisdiction over its own forces while abroad, tempered, however, by the realization that if they acquired that abroad they would have to grant it in the United States, and I cannot see the possibility of the United States Senate agreeing that if a foreign soldier on United States territory, not in the performance of his duty, were to commit a crime, that the foreign military force could try him, and the civilian courts would have no jurisdiction. That, to my mind, cannot be considered" (record of hearings, p. 26).

The committee accepted, uncritically I fear, Mr. Phleger's assertion that a hard bargain had been driven. For example, on page 11 of the committee report, this statement appears:

> "The committee would not look with favor upon a complete surrender of criminal jurisdiction over foreign troops in the United States to a foreign power."

Why not? Let us refer back to Mr. Phleger's example of the French soldier who gets into trouble in Richmond, Va. It is at least 100 times more likely that an American soldier will get into trouble in France. The hearings disclose that only about 3,000 NATO troops are in the United States at any one time. How can anyone seriously believe

that the American people would rather have criminal jurisdiction over foreign troops here than to have 100 times that number of Americans overseas tried by their fellow Americans under the laws prescribed by their representatives in Congress. Americans in Richmond will gladly turn over the French soldier to his commanding officer when they realize that Americans in Marseilles will thereby be kept out of the court of a Communist judge. To trade a dollar for a penny is not a good bargain, Herman Phleger to the contrary notwithstanding.

Other arguments strange to American ears were advanced for their weird bargain. General Smith said that we must "reduce the administrative burden on the troop commander" (record of hearings, p. 3). In my judgment, any good commander knows that the morale of his troops far outweighs the administrative burden of insuring them a fair trial. In addition, Congress has appropriated large sums of money to send officers through law school. Their services should be utilized to give all members of our Nation's Armed Forces, here and abroad the best possible type of military justice.

Messrs. Smith and Phleger also argued that failure to give foreign countries criminal jurisdiction over American troops would jeopardize the maintenance of friendly foreign relations. That is hard to believe. American servicemen are stationed in Europe to defend that soil against overwhelming odds. If the host countries cannot find the manpower for their own defense out of a population greater than ours, if they cannot pay the full cost of maintaining their own forces, if they cannot exact from their forces the same mliitary service we demand of ours, then surely they will not refuse to contribute to the common defense effort by permitting the trial of Americans by Americans. But if their hostility toward America runs so deep, which I doubt, that is an additional reason for not submitting American forces to trial in their courts.

As pointed out in the committee report, page 11, "The United States cannot demand treaty rights for its troops

abroad that it is not willing to accord to foreign troops here." Equality of treatment is provided in the reservation I have proposed. The military authorities of the United States would exercise exclusive criminal jurisdiction over American forces abroad. The same right is recognized with respect to the troops of other NATO countries in the United States. That is the bargain which should have been made originally. It is the only bargain consistent with the legal rights of American servicemen, with generally recognized principles of international law, and with the harsh realities of international relations.

The Secret and Illegal Executive Agreements

The Constitution of the United States provides that Congress shall have power "To make rules for the Government and regulation of the land and naval forces" (art. 1, sec. 8, clause 14). That power applies to forces outside the continental limits of the United States. Congress exercised its constitutional authority. The executive branch of the previous administration flouted the Congress' exercise of its constitutional power by making secret executive agreements. Under these agreements some NATO countries are already trying American servicemen for nonmilitary offenses. Although Mr. Phleger was not responsible for making these secret executive agreements, he defended their legality by citing the President's power as Commander in Chief (record of hearings, p. 66).

This is not a case where the President's action, though unauthorized, was not prohibited by the Congress. The executive agreements surrendering American servicemen to the local courts of NATO countries are in direct violation of the congressional exercise of power to make rules for the regulation of the land and naval forces.

As indicated in the report of the Senate Foreign Relations Committee (p. 5), the Uniform Code of Military Justice permits any offense against the law of the country where troops are stationed to be treated as an offense

against the code. Article 2, paragraph 1, of the code provides that all persons belonging to a regular component of the Armed Forces are subject to its provisions. Article 5 provides that the code shall be applicable in all places.

• • •

What stronger evidence could there be of Congress' intent to make the code applicable to every American serviceman wherever stationed?

• • •

Now we come to the most startling argument of all in favor of the criminal jurisdiction clauses of the Status of Forces Treaty.

According to General Smith, the Senate should approve the treaty because it confers more rights on American servicemen than the secret and illegal executive agreements made by the previous administration (Ex. Rept. 1, pp. 12, 13). There is more to this bootstrap-lifting argument. According to General Smith and Mr. Phleger, if the treaty is not ratified as written, Americans will be turned over to local authorities for trial with even less protection than that provided in the treaty (Record of hearings, pp. 30, 44-45). Never in my experience as a United States Senator have I heard a more brazen challenge to the constitutional authority of the Congress. The Senate is commanded, in effect, to lie down and roll over. I hope that the Senate will not only adopt the reservation I have proposed, but that the Senate Committee on Armed Services will do everything possible to rectify the illegal actions already taken in regard to the trial of American troops abroad.

Diplomatic Immunity for Top NATO Officials; Double Jeopardy for the American GI

It is shocking that the Senate should be asked to approve at this time a treaty (Ex. U, 82d Cong.) which confers diplomatic immunity on representatives of member states of the North Atlantic Treaty Organization, on members

of their official staff, on officials of the Organization, and on experts employed on NATO missions. All these individuals will enjoy varying degrees of immunity from personal arrest or detention. All of them have undertaken their work voluntarily; they receive high salaries; and many of them are exempt from income taxation. Some of the persons who will enjoy diplomatic immunity under the terms of the Organization treaty no doubt helped to draft the criminal jurisdiction provisions of the Status of Forces Treaty.

Contrast the diplomatic immunity conferred under one treaty with the double jeopardy authorized by the other. The average American subject to the Status of Forces Treaty would prefer not to be in military service; is not enjoying any high or tax-free salary; and is not likely to survive if the Soviet Union moves against NATO forces in their present condition of readiness. The discrimination cannot be defended.

Although the committee report refers to safeguards against double jeopardy (p. 5), Mr. Phleger conceded that double jeopardy was possible. (Record of hearings, p. 48.) On this point, Mr. Phleger is right. Article VII, paragraph 8, of the treaty cannot be interpreted in any other way.

• • •

In the negotiation of the treaty, it would appear that the American GI was completely forgotten in the pursuit of global abstractions. This colloquy at the hearings is quite illuminating:

> "Senator Ferguson: Do you not think there is a difference between a situation where citizens voluntarily go to a foreign country, and a situation where men are drafted into military service or voluntarily go into military service, and then are sent as an army to a foreign land?
>
> "Mr. Phleger: I do not see that that distinction, if it is one, is applicable here" (record of hearings, pp. 55, 56).

If Mr. Phleger is still unable to see the difference between an American who goes abroad voluntarily for reasons of business or pleasure or an American drafted into the Army and ordered overseas to defend foreign soil, he is not qualified to be the State Department's Legal Adviser.

A Precedent for the Benefit of Communism

It is my judgment that United States approval of the criminal jurisdiction article of the Status of Forces Treaty would be of immense benefit to the Communist cause. The reason is that the United States must treat all its partners in the fight against Soviet communism equally. At the same time, it is unthinkable that American lives should be entrusted to the jurisdiction of every nation outside the Iron Curtain.

In his prepared statement before the Senate Foreign Relations Committee, General Smith said, "This is a rather precedent-making request" (record of hearings, p. 2). It is indeed, even though General Smith later said the treaty should have been described as unprecedented. It is that, too. General Smith, however, made it abundantly clear that approval of the treaty would establish a precedent, and one which could be broken only at the cost of alienating potential allies in the fight to stem Communist aggression.

No one denies that approval of the treaty would establish a precedent with respect to Japan. The United States is already obligated to surrender the same criminal jurisdiction to Japan that it surrendered to the NATO countries. Is there a Senator among us who can describe criminal law and procedure as it actually operates in Japan?

* * *

Membership in NATO does not mean that all members recognize the same degree of civil and political liberty. Not even Clarence Streit, head of the Atlantic union move-

ment, contends that all NATO countries are so alike as to make a political union of all of those countries feasible. He would exclude from Atlantic union, as not sufficiently housebroken, Greece, Turkey, and several other NATO members.

References were made in the hearings to certain countries in the Middle East where the punishment for theft is to cut off the hand of the offender (record of hearings, pp. 50, 52). Surely no one wants to subject American servicemen to such cruel and inhuman punishment. But how can that be avoided if the treaty before us is approved without reservation? Is General Smith going to tell countries of the Middle East that they are not genteel, or that their system of justice is inferior to that of the NATO countries? I think not. The Middle East is too important to be thrown into the arms of the Communists. We have no alternative but to treat all nations on the same basis so far as jurisdiction over American troops is concerned.

Not being in the State Department, I have no hesitancy in saying that Marshal Tito is not housebroken. But can General Smith say the same? Of course not. If there is any hope of making Tito a trustworthy ally, the State Department cannot make any invidious comparisons between the Yugoslav and Italian judicial systems.

At the present time the United States has military forces stationed in about 40 countries. Are we to tell all but 14 of those nations that they are not genteel, not housebroken? The probability is that rather than alienate their friendship we would subject American boys to their criminal jurisdiction no matter how bizarre or inhuman by our standards.

For this dilemma, there is a very simple remedy. The United States can treat all nations alike by standing on the generally accepted principles of international law which it has followed for more than 150 years.

Americans as a Special, Privileged Class

One argument for approval of the Status of Forces Treaty is more disturbing to me than any other. On pages 11 and 12 of the committee report, this statement appears:

> "Exclusive criminal jurisdiction, amounting to extraterritoriality, itself creates difficult problems. In the eyes of the local population, it sets Americans apart as a special, privileged class, and this fact acts as a constant irritant * * *. Regardless of how fair and just American courts-martial may be, the existence of exclusive criminal jurisdiction seems to the other country to be an infringement of its sovereignty."

So long as Americans insist on a higher standard of civil and political rights than their neighbors, they will, to that extent, seem to stand alone as a special, privileged class. The contrast would not be so great, of course, if Americans were willing to accept European concepts of freedom. Even in trials before courts-martial, Americans are guaranteed the presumption of innocence; protected against cruel and inhuman punishment; convicted only on proof of guilt beyond a reasonable doubt; granted the privilege against self-incrimination; and granted the rights to various appeals, even up to the President of the United States. None of these safeguards for American forces are guaranteed by the Status of Forces Treaty.

The proposed treaty does not even give the accused the right to public trial. In fact, such a right is denied by implication in article VII, paragraph 9 (g), providing that the accused shall be entitled "to communicate with a representative of the government of the sending state and, when the rules of the court permit, to have such a representative at his trial."

Thus, it is clear that under certain circumstances even representatives of the accused's commanding officer may be excluded from the trial.

It is true that the Uniform Code of Military Justice does not guarantee any right to a public trial. But the American tried by courts-martial is tried by Americans. He is surrounded by numerous safeguards provided by Congress. In liberalizing court-martial procedure by enacting the Uniform Code Congress created a Court of Military Justice, on which three distinguished judges are now serving. Congress has the power to improve the code at any time it sees fit. But if the Status of Forces Treaty is approved without reservation, neither Congress nor the President can correct an injustice done to an American serviceman. The treaty cannot even be denounced until 5 years after ratification.

It is not enough merely even to look at excerpts from the constitutions and laws of other countries. Many fine phrases are qualified by other provisions effective in national emergencies proclaimed by the authorities. There is not one United States Senator who really knows the type of trial given to persons accused of crimes in all the NATO countries and Japan.

The hearings do not mention how prisoners are treated in NATO countries and in Japan. We know that confinement by our own military authorities takes place under conditions that are humane and sanitary. Will the Senate Foreign Relations Committee certify to the American people that the same conditions prevail in the penal institutions of NATO countries and Japan?

If Americans, by reason of their unique respect for fundamental human rights, are a special or privileged class, they have not shirked their responsibility to people less fortunate. Billions of dollars have, for example, been poured into NATO countries. That contribution would have been impossible without the concept of freedom which distinguishes Americans from other people. Reasonable and honest men may differ in regard to the number of dollars Congress may give away with safety. But to give away the rights of Americans serving in the uniform of their country is unthinkable.

Appendix VII

Extract from Report of Hearings held before Subcommittee of the Senate Committee on Armed Services, March 29th, 31st and June 21st, 1955:

* * *

Senator Flanders. I am just raising at this time the question, if treaty authority was required for the NATO countries, what the authority was for other arrangements made with other non-NATO countries.

Mr. Leigh. We had agreements of course before the Status of Forces Treaty came into effect or before it was negotiated and my understanding has been that they were generally negotiated under the theory that the President had power as Commander in Chief to make the necessary arrangements for troops abroad.

But you will find an enormous range of arrangements in this field. Some have the positive sanction of Senate approval. Others have what I might call the Japanese situation. And others are much less formal.

Senator Flanders. As you know, this question of treaties, executive agreements, et cetera, is something about which the Senate has expressed a great deal of interest from time to time, and I was just anxious to get onto the record the statements of the points of view of the Defense Department as to the authority in making these arrangements in non-NATO countries.

Do I understand from what you have just said that you would generally feel that the President had the authority to make such arrangements?

Mr. Leigh. That was my understanding of the theory on which those arrangements were made.

Senator Flanders. But then following through on that same theory would it be your understanding that the NATO cases were incorporated in that treaty so that in connection with those countries at least there should be no question raised?

Mr. Leigh. My understanding, Senator Flanders, was that the NATO Treaty was a comprehensive document covering a great many arrangements besides jurisdictional arrangements for our troops. * * *

Appendix VIII

Testimony of Major General George W. Hickman, Jr., Asst. Judge Advocate General U. S. Army respecting the operation of the NATO Status of Forces Treaty in Turkey. (Japan has similarly interpreted and acted on the Administrative Agreement):

Although our military operations under the Status of Forces Agreement have progressed satisfactorily, the Turks have interpreted the Status of Forces Agreement as vesting in the courts of Turkey final authority to determine whether offenses committed by members of the United States forces actually occurred during the performance of official duty. Although the Status of Forces Agreement does not specify who shall have the authority to make a final determination as to such matters, it is the position of the Department of Defense, based upon the minutes of the NATO working group which drafted the SOF Agreement, that such determination should properly rest with the authorities of the sending state.

However, Turkey has not done so. I have a case just somewhat illustrative of the point.

There was an Air Force sergeant who on April of 1953 was driving a jeep in connection with the motion-picture service in Ankara, Turkey, when he struck and injured a pedestrian. As a result of the accident, the sergeant was charged by the Turkish authorities with reckless driving.

A preliminary hearing was not held until about 8 months later, at which time trial in the Turkish courts was set for sometime in March. In the Turkish proceeding they bite off a little bit of the trial at one time and they adjourn for a week or two, and then they call all the witnesses and they come back and bite off another little section of the proceedings, and so on, until they finally get it finished. That is the Turkish system.

Sentence in this case was imposed on the 1st of November 1954. The sentence was to 3 months confinement, and a fine of 500 Turkish lira. However, the entire sentence was suspended. We are informed that the United States Embassy initiated a request that the sergeant leave Turkey within 24 hours of the sentence.

But a great deal of the delay prior to the trial was occasioned over the squabble about the official duty status of the sergeant, who at the time of the offense was working for extra pay for the Armed Services Motion Picture Service after his normal duty hours. The Turks said it wasn't official duty. We said it was. They won.

The joint military authorities have reported that jurisdiction arrangements in Turkey have had an adverse effect upon the morale of the United States forces due to the delays in investigations and trial. These delays result in frequent absence from duty station of the accused and of other personnel concerned with the proceedings, those that are monitoring the proceedings and those there as witnesses. An investigation is presently being conducted to determine what steps can be taken to remedy this situation.

An informal report from our judge advocate with the joint group in Turkey indicates that it is all part of the Turkish system. They are not indicating discrimination against us. The judiciary is completely independent of the executive department, and once they get a case, it is theirs, and they will brook no interference. Furthermore, they have that system that I mentioned a little earlier of getting all the witnesses in and hearing all they can one day and then adjourning until 2 or 3 weeks later, taking up the next phase of the case.

Appendix IX

Affidavit of Robert Dechert, General Counsel, Department of Defense, Respecting Status of Camp Weir Area.

IN THE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

H. C. 47-57

WILLIAM S. GIRARD United States Army Specialist 3/C, Petitioner,

vs.

CHARLES E. WILSON Secretary of Defense et al., Respondents.

AFFIDAVIT WITH RESPECT TO MANEUVER AREA

COMMONWEALTH OF VIRGINIA
COUNTY OF ARLINGTON } ss.:

ROBERT DECHERT, being first duly sworn, deposes and says:

I am the General Counsel of the Department of Defense. The following information has been received through official channels regarding the Camp Weir Maneuver Area.

The Camp Weir (known by the Japanese as Somagahara) Maneuver Area was used by the Japanese Army before and during World War II. It was seized by the United States Forces on or about April 11, 1946. The area was formally obtained by procurement demand on the Imperial Japanese Government No. 4219, dated October 20, 1951, which designated April 11, 1946 as the delivery date. The Japanese Government has paid rents to private owners of land in the area for the period 1946 until departure of the First Cavalry Division to Korea in 1950. For approximately one and a half years after departure of the First Cavalry Division the land lay idle. Local farmers began

encroaching upon the area during this period. On April 28, 1952, the Japanese Peace Treaty, Security Treaty and Administrative Agreement became effective. Under Article II of the Administrative Agreement, Japan agreed to furnish to the United States "facilities and areas" necessary to carry out the purpose stated in Article I of the Security Treaty. Paragraph 1, Article II of the Administrative Agreement provides in part:

"Agreements as to specific facilities and areas, not already reached by the two governments by the effective date of this agreement, shall be concluded by the two governments through the Joint Committee provided for in Article XXVI of this agreement."

At the time the Administrative Agreement became effective no agreement had been reached by the Japanese Government and the United States Government on the Camp Weir Maneuver Area. However, on July 26, 1952, the following agreement was reached by the Joint Committee:

"1. The facilities and areas the use of which is to be granted by Japan to the United States of America in accordance with Paragraph 1 of Article II of the Administrative Agreement signed at Tokyo on February 28, 1952, under Article III of the Security Treaty between Japan and the United States of America shall be as provided in the schedule attached hereto, except where indicated 'pending' in the schedule.

"2. It is confirmed that the facilities or areas indicated 'pending' in the schedule refer to those facilities or areas the continued use of which is to be granted to the United States in accordance with the notes exchanged between Mr. Katsuo Okazaki, Minister of State of Japan, and Mr. Dean Rusk, Special Representative of the President of the United States of America, at Tokyo on February 23, 1952. Negotiations with reference to these facilities or areas shall be continued between the two governments."

The Camp Weir Maneuver Area was designated as facility No. 3039 on the schedule referred to in the above-

quoted agreement, furnished for indefinite use, but indicated as "pending." The notes exchanged between Mr. Rusk and Mr. Okazaki, referred to in the agreement quoted above, provided that facilities and areas used by the United States prior to the date of the Administrative Agreement would continue to be used on the same basis as used theretofore until either a formal agreement was reached on such facilities or areas or until such facilities or areas were released by the United States. No formal agreement has ever been reached on the Camp Weir Maneuver Area because the Japanese and United States representatives of the Joint Committee have not been able to reach an agreement on the exact boundaries of the area. The dispute over boundaries arises principally from the Japanese demand that areas encroached upon by local farmers be released from the maneuver area. At sometime in late 1951 or early 1952 the United States agreed to permit the National Safety Police (which later became the Japanese Self-Defense Force) to use certain portions of the Camp Weir Maneuver Area for an Artillery and Armored School. This agreement provided that the National Safety Police would be required to vacate the premises on 60 days notice by the United States. A new agreement containing the same sixty-day vacate notice provision was effected on March 30, 1954. This agreement was terminated effective October 15, 1954 by giving notice to vacate on August 12, 1954. Since the termination of this agreement the United States at the request of the Japanese Government has from time to time permitted the Japanese Self-Defense Force to use the Camp Weir Maneuver Area on a temporary basis. At the time of the Girard incident the area was being used solely by the United States Forces.

/S/ ROBERT DECHERT
ROBERT DECHERT
General Counsel
Department of Defense

Subscribed and sworn to before me this 11th day of June 1957. My commission expires: Dec. 29, 1959.

/S/ E. W. HERL
Notary Public

(SEAL)

Appendix X

Directive issued by the Commanding General, Far East Air Forces, dated 31 October 1956, subject: Motor Vehicle Accidents Involving Death or Injury to Japanese.

HEADQUARTERS

FAR EAST AIR FORCES
APO 925

31 October 1956

SUBJECT: Motor Vehicle Accidents Involving Death or Injury to Japanese

To: ALL FEAF Personnel in Japan

1. The Japanese Government has on numerous occasions brought criminal indictments against United States personnel, military and civilian, for injuries or death to Japanese Nationals arising out of motor vehicle accidents. These indictments allege violation of Article 211 of the Penal Code of Japan which provides in part as follows:

> "A person, who fails to use such care as is required in the performance of profession, occupation or routines and thereby kills or injures another, shall be punished with imprisonment for not more than three years or a fine of not more than one thousand yen."

2. This means that very high standards of skill and care in driving an automobile are required. It means that one may be convicted in criminal court and imprisoned in Japanese confinement facilities, for his part in an automobile accident, under circumstances such that in the United States he would not be considered negligent, or at fault, and would not be found criminally or civilly liable. Exceeding the speed limit, driving while under the influence of liquor or leaving the scene of an accident would no doubt

greatly aggravate any offense under Article 211. The existence of many automobiles in Japan is a relatively new phenomenon and many Japanese do not yet realize their danger. The purpose of this letter is to help you avoid joining the ranks of United States military and civilian personnel now in Japanese jails.

3. Recently an Air Force officer was sentenced to confinement in a Japanese prison for causing the death of a Japanese National through negligent operation of his automobile. The judge, in rendering judgment, commented that in determining sentence he had taken into consideration the fact that the officer had failed to observe the custom of visiting the family of the deceased and expressing his sympathy. Other cases have come to the attention of this Headquarters where this custom was observed by the American driver causing injury; observance considerably eased subsequent dealings between the parties concerned.

4. It is important to note that in Japan, unlike the situation in the United States, the above mentioned practice is not construed as an admission of liability or fault on the part of the person making the call. The caller should however refrain from making any comment, to the victim or his family, as to responsibility for the accident. Where the individual causing injury is driving his private vehicle, he should if possible contact the local representative of his insurance company before visiting the injured person or his family, or taking other actions outlined in FEAF Regulation No. 30-7. Where, however the accident occurs on a Saturday, for example, and the insurance representative cannot be reached until the following Monday, there would generally be no objection to visiting the injured person or the deceased's family on a Sunday, taking fruit or flowers. Where money is later given (as with the approval of the insurance company) an appropriate amount might be be-

tween one and five thousand yen. It is noted that the insurance company normally will make no reimbursement for this money or other gifts.

5. Common courtesy and basic humanitarian principles, as well as the observance of proper American-Japanese relations, call for expressions of sympathy in situations mentioned above. FEAF Regulation No. 30-7, is to be used as a guide by all personnel of this Command who become involved in an accident resulting in death or serious injury to Japanese. Such persons should also contact the individual who has been appointed by the installation commander to give advice in such matters. The local office of the Staff Judge Advocate can give you his name.

BY ORDER OF THE COMMANDER:

/s/ C. H. POTTENGER
/t/ C. H. POTTENGER
Brigadier General, USAF
Deputy for Personnel
and Administration